Supreme Court, U.S.
FILED
061470 MAY 07 2007
OFFICE OF THE CLERK

No. ____

IN THE

Supreme Court of the United States

TOWN OF NORWOOD, MASSACHUSETTS,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBERT A. JABLON*
DANIEL I. DAVIDSON
SHARON COLEMAN
* *Counsel of Record*
SPIEGEL & MCDIARMID
1333 New Hampshire Ave., NW
Washington, DC 20036
202-879-4000

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

The Federal Power Act ("FPA") requires rates and charges for the sale of wholesale electric energy to be "just and reasonable." FPA §§ 205-206, 16 U.S.C. §§ 824d-824e.

1. Was the Court of Appeals' affirmance of FERC orders that the Town of Norwood, Massachusetts, must pay the New England Power Company ("NEP"), Norwood's former wholesale electric supplier, contract termination charges of approximately $72 million plus interest or an average of $4,792 per customer (without interest) consistent with the FPA's "just and reasonable" and the Administrative Procedure Act review requirements where (a) FERC never considered whether the components of the contract termination charge formula were "just and reasonable" or whether the amount of the charge reflected NEP's actual costs or losses from Norwood's contract termination; and (b) NEP suffered no or minimal costs, economic losses or damages from Norwood's contract termination?

2. Where FERC had previously approved a tariff amendment containing a contract termination charge formula on a "generic" basis, but did not examine whether the components of the formula were "just and reasonable" and did not accept for filing or approve the amount of the company's claimed charge, and where the Court of Appeals had previously held that the substance of the contract termination charge could be presumably litigated in a later case, did the Court of Appeals correctly hold in the instant case on grounds of *res judicata* that FERC could order a customer to pay a $72 million contract termination charge plus interest based upon FERC's prior approval of the tariff amendment when FERC had never examined whether the amount of the charge or its components were "just and reasonable"?

PARTIES TO THE PROCEEDING

Town of Norwood, Massachusetts, *Petitioner.*

Federal Energy Regulatory Commission, *Respondent.*

New England Power Company, *Intervenor* below.

As a governmental entity, the Town of Norwood is not covered by Court Rule 29.6 as referenced in Court Rule 14.1(b).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ii

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vi

PETITION 1

OPINIONS AND ORDERS BELOW 1

BASIS FOR JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 14

I. SUMMARY 14

II. *TOWN OF NORWOOD, P.U.D, P.U.C.* AND *LOCKYER* ARE IN A CONFLICT THAT SHOULD BE RESOLVED 16

III. WHERE ISSUES ARE LEFT OPEN FOR FUTURE CONSIDERATION, FERC MAY NOT APPLY *RES JUDICATA* TO AVOID EXERCISING BASIC STATUTORY RESPONSIBILITIES 19

IV. THIS COURT SHOULD REVIEW THE FIRST CIRCUIT'S HAVING ALLOWED FERC TO ABANDON ITS STATUTORY DUTY TO SET A "JUST AND REASONABLE" CHARGE 25

V. THE SEVERE HARM TO NORWOOD JUSTIFIES GRANTING THE WRIT 30

CONCLUSION 30

TABLE OF CONTENTS - Continued

Page

APPENDIX A - Opinion of the United States Court of Appeals for the First Circuit for which the writ is sought: *Town of Norwood v. FERC*, 476 F.3d 18 (1st Cir. 2007) ("*Town of Norwood*"). 1a

APPENDIX B - Agency Orders Below, which were entered in the case subject to the Petition for Review : Order on Initial Decision, *Town of Norwood, Mass. v. National Grid USA,* 112 F.E.R.C. ¶ 61,099 (July 22, 2005) ("Order on Initial Decision"); 20a

Order on Rehearing and Compliance Filing, *Town of Norwood, Mass. v. National Grid USA*, 114 F.E.R.C. ¶ 61,187 (Feb. 22, 2006)("Rehearing Order"); 67a

Order Denying Rehearing and Request for Stay, *Town of Norwood, Mass. v. National Grid USA*, 115 F.E.R.C. ¶ 61,396 (June 30, 2006); 95a

Initial Decision, *Town of Norwood, Mass. v. National Grid USA*, 107 F.E.R.C. ¶ 63,041 (June 9, 2004). 127a

APPENDIX C - Judgment of the Court of Appeals for the First Circuit (February 2, 2007); and Mandate of the Court of Appeals for the First Circuit (March 26, 2007). 210c

APPENDIX D - Relevant Statutory Provisions Federal Power Act ("FPA") §§ 201, 205, 206, 309, 313(a), (b), 16 U.S.C. §§ 824, 824d, 824e, 825h, 825*l*(a), (b); Administrative Procedure Act ("APA"), § 10(e), 5 U.S.C. § 706; 28 U.S.C. § 1254(1)(a), (b). 212a

TABLE OF CONTENTS - Continued

Page

APPENDIX E - Related Opinion of the Court of Appeals for the First Circuit: *Town of Norwood v. FERC,* 202 F.3d 392 (1st Cir. 2000) ("Norwood I") 231a

APPENDIX F - Excerpts from some federal statutes containing "just and reasonable" requirements.....256a

APPENDIX G -1998 FERC Orders accepting the CTC in FERC Docket No. ER98-2233 .....270a

Order Denying Rehearing, *New England Power Co.*, 84 F.E.R.C. ¶ 61,175 (Aug. 5, 1998); 270a

Order Accepting Amendment for Filing, New England Power Co., 83 F.E.R.C. ¶ 61,174 (May 15, 1998) ("Order Accepting CTC Amendment").....275a

APPENDIX H - Glossary of abbreviated terms.....283a

TABLE OF AUTHORITIES

CASES

Acker v. U.S., 298 U.S. 426 (1936) 27

Ala. Elec. Coop., Inc. v. FERC, 684 F.2d 20 (D.C. Cir. 1982) 28

Ala.-Tenn. Natural Gas Co. v. FPC, 359 F.2d 318 (5th Cir. 1966) 27

Ark. La. Gas Co. v. Hall, 453 U.S. 571 (1981) 24

Cal. ex rel. Lockyer v. FERC, 383 F.3d 1006 (9th Cir. 2004), *petitions for cert. filed sub nom. Coral Power, L.L.C. v. Cal.*, 75 U.S.L.W. 3355 (U.S. Dec. 28, 2006) (No. 06-888), *and* 75 U.S.L.W. 3410 (U.S. Feb. 5, 2007) (No. 06-1100) ..... *passim*

Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074 (1987) (en banc), *cert. denied*, 485 U.S. 913 (1988) 23

El Paso Natural Gas Co. v. FPC, 281 F.2d 567 (5th Cir. 1960) 27-28

Elec. Dist. No. 1 v. FERC, 774 F.2d 490 (D.C. Cir. 1985) . 24

Farmers Union Cent. Exch. Inc. v. FERC, 734 F.2d 1486 (D.C. Cir. 1984) 26, 27

FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944) 26-27, 28

Johnson v. De Grandy, 512 U.S. 997 (1994) 20

Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982) 20, 22

K N Energy, Inc. v. FERC, 968 F.2d 1295 (D.C. Cir. 1992) 27

Landsdale v. F.P.C., 494 F.2d 1104 (D.C. Cir. 1974) 23

Maislin Indus. U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990) 24

Midwestern Gas Transmission Co. v. FPC, 388 F.2d 444 (7th Cir. 1968) 27

Mobil Oil Corp. v. FPC, 417 U.S. 283 (1974) 27

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) 23, 29

Munn v. Ill., 94 U.S. 113 (1876) 26

NSTAR Elec. & Gas Corp. v. FERC, No. 05-1362 (D.C. Cir. Mar. 9, 2007) 28

Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 27

Pub. Serv. Co. of N.M. v. FERC, 832 F.2d 1201 (10th Cir. 1987) 24

Pub. Util. Dist. No. 1 of Snohomish County, Wash. v. FERC, 471 F.3d 1053 (9th Cir. 2006) ("*P.U.D.*") ..... *passim*

Pub. Utils. Comm'n of Cal. v. FERC, 474 F.3d 587 (9th Cir. 2006) ("*P.U.C.*") ..... *passim*

Sithe Independence Power Partners, L.P. v. FERC, 285 F.3d 1 (D.C. Cir. 2002) 27, 28

Sithe New England Holdings, LLC v. FERC, 308 F.3d 71 (1st Cir. 2002) 26

Smyth v. Ames, 169 U.S. 466 (1897) 26

Tagg Bros. v. United States., 280 U.S. 420 (1930). 23

Town of Norwood v. FERC, 202 F.3d 392 (1st Cir. 2000) ("*Norwood I*") ..... *passim*

Town of Norwood v. FERC, 476 F.3d 18 (1st Cir. 2007) ("*Town of Norwood*"). ..... *passim*

Town of Norwood v. New England Power Co., 202 F.3d 408 (1st Cir. 2000) 7-8

Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub. nom. N.Y. v. FERC*, 535 U.S. 1 (2002) 21

United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966) 20

AGENCY CASES

City of Alma, Mich., 96 F.E.R.C. ¶ 61,163 (2001), *reh'g denied*, 97 F.E.R.C. ¶ 61,147 (2001) 21

City of Las Cruces, N.M. v. El Paso Elec. Co., 87 F.E.R.C. ¶ 61,201 (1999) 21

New England Power Co., Order Accepting Amendment for Filing, 83 F.E.R.C. ¶ 61,174 *reh'g denied,* 84 F.E.R.C. ¶ 61,175 (1998) ("Order Accepting CTC Amendment") 6-7, 21, 22

Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,539 (May 10, 1996), [1991–1996 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,036 ("Order No. 888"), *clarified*, 76 F.E.R.C. ¶ 61,009 (1996), *modified*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), [1996–2000 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 62 Fed. Reg. 64,688 (Dec. 9, 1997), 81 F.E.R.C. ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. N.Y. v. FERC*, 535 U.S. 1 (2002) ..... *passim*

Town of Norwood v. Nat'l Grid USA, Order Setting Complaint for Hearing in Part and Dismissing It in Part and Establishing Settlement Judge Procedures, 104 F.E.R.C. ¶ 61,030 (2003) ("Hearing Order") 2, 8-9

Town of Norwood, Mass. v. Nat'l Grid USA, Initial Decision, 107 F.E.R.C. ¶ 63,041 (2004) ("Initial Decision") 2, 3, 4, 10

Town of Norwood, Mass. v. Nat'l Grid USA, Order on Initial Decision, 112 F.E.R.C. ¶ 61,099 (2005) ("Order on Initial Decision") ..... *passim*

Town of Norwood, Mass. v. Nat'l Grid USA, Order on Rehearing and Compliance Filing, 114 F.E.R.C. ¶ 61,187 (2006) ("Rehearing Order") 1-2, 10

Town of Norwood, Mass. v. Nat'l Grid USA, Order Denying Rehearing and Request for Stay, 115 F.E.R.C. ¶ 61,396 (2006) 2

STATUTES, REGULATIONS, AND RULES

Administrative Procedure Act § 10(e), 5 U.S.C. § 706(e) 2, 23, 28-29

Federal Power Act, 16 U.S.C. § 791a *et seq* ..... *passim*

Federal Power Act § 201, 16 U.S.C. § 824 ..... 2, 3, 6

Federal Power Act § 205, 16 U.S.C. § 824d 2, 17, 28

Federal Power Act § 206, 16 U.S.C. § 824e ..... *passim*

Federal Power Act § 309, 16 U.S.C. 825h 3

Federal Power Act § 313(b), 16 U.S.C. 825*l*(b) 3

Hepburn Act, ch. 3591, 34 Stat. 584 (1906) 26

28 U.S.C. § 1254(1) 2

Sup. Ct. R. 13 2

TREATISES AND OTHER AUTHORITIES

James C. Bonbright et al., Principles of Public Utility Rates 76 (2d ed. 1988). 25

James Wallace Bryan, The Constitutional Aspects of the Senatorial Debate on the Rate Bill, 41 Am. L. Rev. 801 (1907). 26

Frank M. Cobb, "Reasonableness of Maximum Rates as a Constitutional Limitation on Rate Regulation," 21 Harv. L. Rev. 175 (1907-08). 26

2 Kenneth Culp Davis, Administrative Law Treatise § 18.02 (1958). 23, 24

Edison Elec. Inst., Key Facts About the Electric Power Industry 3 (2007), available at http://www.eei.org/industry_issues/industry_overview_and_statistics/nonav_key_facts/KeyFacts_Web.pdf 29

Lord Chief Justice Hale, *De Portibus Maris*, 1 Harg. Law Tracts 78 (1787) 26

II Richard J. Pierce, *Administrative Law Treatise* § 13.3 (Aspen 4th ed. 2002) 23

Restatement (Second) of Judgments § 26 (1982) 20

PETITION FOR A WRIT OF *CERTIORARI*

The Town of Norwood, Massachusetts, respectfully petitions for a writ of *certiorari* to review the judgment of the Court of Appeals for the First Circuit in *Town of Norwood v. FERC*, 476 F.3d 18, dated February 2, 2007. (Pet. App. 1a) ("*Town of Norwood*").[1] This case relates to *Pub. Util. Dist. No. 1 of Snohomish County, Wash. v. FERC*, 471 F.3d 1053 (9th Cir. 2006) ("*P.U.D.*"), *Pub. Utils. Comm'n of Cal. v. FERC*, 474 F.3d 587 (9th Cir. 2006) ("*P.U.C.*"), and *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1012-13 (9th Cir. 2004), *petitions for cert. filed sub nom. Coral Power, L.L.C. v. Cal.*. 75 U.S.L.W. 3355 (U.S. Dec. 28, 2006) (No. 06-888), *and* 75 U.S.L.W. 3410 (U.S. Feb. 5, 2007) (No. 06-1100) ("*Lockyer*") for which petitions for *certiorari* have been or will be filed. All of these cases raise issues of the requirements under the Federal Power Act ("FPA")'s "just and reasonable" provisions and of the timing of necessary Federal Energy Regulatory Commission review. In this case FERC has never examined whether a $71,881,517 plus interest contract termination charge ("CTC") had a "just and reasonable" cost basis under the Act.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is reported in *Town of Norwood v. FERC*, 476 F.3d 18 (1st Cir. 2007) (Pet. App. 1a) ("*Town of Norwood*"). FERC's orders that were reviewed by the First Circuit are: *Town of Norwood, Mass. v. National Grid USA et al.*, Order on Initial Decision, 112 F.E.R.C. ¶ 61,099 (July 22, 2005) ("Order on Initial Decision") (Pet. App. 20a); Order on Rehearing and Compliance Filing, 114 F.E.R.C. ¶ 61,187 (February 22,

---

[1] Pet. App. is the Petitioner's Appendix attached hereto. "JA-0000" is the Joint Appendix filed in the Court of Appeals by all parties. A Glossary of abbreviated terms is provided for the convenience of the Court as Pet. App. H.

2006) ("Rehearing Order") (Pet. App. 67a) and Order Denying Rehearing and Request for Stay, 115 F.E.R.C. ¶ 61,396 (June 30, 2006) (Pet. App. 95a). Additional FERC case orders are FERC's Order Setting Complaint for Hearing in Part and Dismissing It in Part and Establishing Settlement Judge Procedures, 104 F.E.R.C. ¶ 61,030 (July 2, 2003) ("Hearing Order") (Pet. App. 112a), and the Administrative Law Judge ("ALJ")'s Initial Decision, *Town of Norwood, Massachusetts v. National Grid USA et al.*, 107 F.E.R.C. ¶ 63,041 (June 9, 2004) ("Initial Decision") (Pet. App. 127a-209a).

BASIS FOR JURISDICTION

This Court has *certiorari* jurisdiction under 28 U.S.C. § 1254(1) and Court Rule 13. The First Circuit's judgment was entered February 2, 2007 (Pet. App. 210a) and its mandate was issued on March 26, 2007.

STATUTORY PROVISIONS INVOLVED

Federal Power Act, §§ 201, 205 and 206, 16 U.S.C. §§ 824, 824d and 824e (Pet. App. D).

Administrative Procedure Act, § 10(e), 5 U.S.C. § 706 (Pet. App. 229).

STATEMENT OF THE CASE

Overview: The First Circuit affirmed FERC orders requiring the Town of Norwood to pay New England Power Company ("NEP") a contract termination charge ("CTC") of $71,881,517 plus interest even though NEP had minimal or no losses from Norwood's contract termination. *Town of Norwood v. FERC*, 476 F.3d 18 (1st Cir. 2007) (Pet. App. 1a) (*"Town of Norwood"*); Order on Rehearing and Compliance Filing, 114 F.E.R.C. ¶ 61,187 at P 51 (2006) ("Rehearing Order") (2006) (Pet. App 91a). FERC ordered interest at 18 percent, bringing the total to approximately $115 million (computed from JA-0419 and at JA-0553-4, respectively) (JA-0553-54) (Pet. App 108a). This averages to $4,792 for

every Norwood customer (without interest) and $7,667 applying FERC's ordered 18 percent interest rate. Because the First Circuit remanded interest rate issues to FERC, these issues are not a subject of this petition. [2]

In conjunction with electric industry restructuring, in 1996 through 1998 NEP entered into agreements to sell its generating plants. Initial Decision, PP 4-5, 66-68, 132 (Pet. App. 130a, 165a-168a, 203a-204a). These plants produced electricity that was sold at wholesale to Norwood and others. Norwood, which operates a municipal electric system in Southeastern Massachusetts, resold most of the power to its residents and businesses. (JA-1118.)

As a result of NEP's plant sales, Norwood terminated its NEP cost-of-service power purchase contract. (JA-1248-49.) NEP then filed at FERC a contract termination charge tariff amendment that allowed Norwood to cease purchasing wholesale power, subject to Norwood's paying a CTC. (JA-1255-68 at 1256-57.)

NEP did not suffer *any* significant losses or damages from termination. (*See generally* JA-0420-23, 0429-30, 0435-44 and references therein.) NEP sold its fossil fueled plant at a $500 million profit (JA-0429, 1385-86, 1416) and sold its nuclear plant and wholesale power purchase contracts at prices that would make it nearly whole (JA-0429-30). The market value of the power that Norwood released was above Norwood's contract price. (JA-0439-40 and references cited therein; JA-1695.)

---

[2] NEP was a jurisdictional seller under FPA §§ 201 and 206, 16 U.S.C. §§ 824 and 824e, because it sold wholesale electric power in interstate commerce. FPA, § 201(b)(1), 16 U.S.C. § 824(b)(1). FERC had jurisdiction under FPA §§ 201, 206 and 309, 16 U.S.C. §§ 824, 824e, and 825h. The Court of Appeals had jurisdiction to review FERC FPA orders under FPA §313(b), 16 U.S.C. § 825*l*(b).

FERC never examined – either in 1998 when the CTC amendment was filed or in this case when the amount of the charge was set – whether the amount of NEP's charge was cost justified. It never examined the actual amount of NEP's losses from Norwood's termination, if any. Such losses were zero or minimal. The failure of FERC to examine NEP's actual costs from termination explains the difference between the $72 million CTC that FERC ordered and NEP's *de minimis* or zero actual losses.[3]

The contract termination charge: The CTC was intended to compensate NEP for its unrecoverable costs when wholesale customers end their contract purchases under electricity restructuring to buy from others. (JA-1390) Restructuring was intended to adopt a competitive electric power industry model. *Town of Norwood v. FERC*, 202 F.3d 392, 396-97 (1st Cir. 2000) ("*Norwood I*") (Pet. App. 232a-235a). Under the CTC Tariff Amendment departing

---

[3] The calculation of the exact amount of NEP's losses, if any, varies depending upon what factors are considered. If one takes into account only NEP's fossil fueled plant sales, as did the Administrative Law Judge's ("ALJ") Initial Decision, NEP had relatively small losses of $16,925,796 (107 F.E.R.C. ¶ 63,041, PP 68-71, 111, 142 (Pet. App. 167a-170a, 194a, 209a)); if one considers the actual market value of power or a combination of plant sales and market value, NEP had no losses and, indeed, a gain from the termination of sales to Norwood. See text above. Because the CTC formula Revenue factor was based on NEP's total costs for all its plants and purchased power, a sale of assets for any amount would reduce its costs and therefore any appropriate CTC. (JA-1264-66; Initial Decision, P 2, 16-17; Pet. App. 129a, 135a-136a.) One demonstration that the CTC was not cost justified comes from uncontested record evidence that shows that NEP's lost equity profits under cost-of-service rates from Norwood's not continuing its wholesale purchases were $13,715,721 (JA-1571a) compared with the $72 million CTC. (JA-1512, 1676-77, 1571a). Thus, without taking into account NEP's plant sales or actual market prices, NEP will earn far more from the CTC than it would have earned from continued power sales.

customers must pay NEP a charge based upon the revenues that NEP would have received absent contract termination less the market value of the power that they do not buy. In simplified terms, the formula is CTC = (R-M) x L, where R equals Annual Revenues under the sales contract, M equals the Market Value of the released power and L equals the Length of the remaining contract term. The formula is capped by customers' proportionate contributions to NEP's generating plant capital costs. Order on Initial Decision at PP 10-12, 57 & n.85 (Pet. App. 25a, 49a-50a).

With only two exceptions, NEP said that its contract termination charge formula followed the FERC Order No. 888 "stranded costs" formula. (JA-1257)[4] In Order No. 888 FERC required that all jurisdictional transmission owners file "open access" transmission tariffs to foster wholesale electricity competition, but it also required that power purchasers use Order No. 888 transmission tariffs to buy from others, they reimburse transmission owners for their "stranded costs." Stranded costs are non-recoverable costs incurred by power suppliers who made investments having

---

[4] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,539 (May 10, 1996), [1991–1996 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,036 ("Order No. 888"), *clarified*, 76 F.E.R.C. ¶ 61,009 (1996), *modified*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), [1996–2000 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 62 Fed. Reg. 64,688 (Dec. 9, 1997), 81 F.E.R.C. ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. N.Y. v. FERC*, 535 U.S. 1 (2002).

had a "reasonable expectation" of continued sales to departing customers.[5]

FERC's orders accepting the CTC Amendment: In 1998 FERC accepted NEP's CTC amendment, but it did not accept NEP's attempt to file charge calculations and did not rule on the justness and reasonableness of NEP's formula components. Order Accepting Amendment for Filing, *New England Power Co.*, 83 F.E.R.C. ¶ 61,174, 61,721-22 (1998), (Pet. App. 275a-278a), *reh'g denied,* 84 F.E.R.C. ¶ 61,175 (1998) (Pet. App. 270a) ("Order Accepting CTC Amendment").[6]

---

[5] *Id.* at 31,778-89, 31,839-40. The Order No. 888 stranded costs formula does not strictly govern the NEP-Norwood contract termination because stranded cost payments are only for the contract period and Norwood is not using NEP transmission to reach alternative suppliers. *See Norwood I*, 202 F.3d at 398-399 (Pet. App. 235a-239a). In its CTC filing, however, NEP applies the Order No. 888 approach and formula. (JA-1257, 1264-68.)

[6] Norwood protested NEP's rights to charge Norwood a CTC where NEP was selling its plant. "Motion to Intervene and Motion to Reject of the Town of Norwood, Massachusetts," *New England Power*, Docket No. ER98-2233 (Apr. 7, 1998) at 9-11 *available at* FERC eLibrary accession no. 19980408-0057) ("Motion to Reject"); Supplement to the Motion to Reject of the Town of Norwood, Massachusetts," (Apr. 16, 1998) at 3 *available at* FERC eLibrary accession no. 19980417-0007) ("Supplement"). It said that NEP's claimed "stranded costs applicable to Norwood were unsupported, except by bare assertions contained in Exhibit E, Attachment A;" that the "proposed costs cannot be deemed just and reasonable as offered;" and that "acceptance of NEP's proposed stranded cost charges against Norwood would require a hearing...." Motion to Reject at 19 n.15. *Accord,* Supplement at 10-12 and Attachment A at 5-7. "Request for Rehearing of the Town of Norwood, Massachusetts," (June 15, 1998) at 8-9, 20-21, 23-27, 29-30, 63-72, *available at* FERC eLibrary accession no. 19980616-0666. FERC did not order a hearing on the amount of the CTC when it accepted the CTC filling, but, significantly, *it also did not accept for filing NEP's Exhibit E,*

First Circuit 2000 decision: Norwood sought Court of Appeals review of FERC's orders accepting NEP's CTC tariff amendment. The First Circuit affirmed FERC's orders. *Norwood I* (Pet. App. E), stating that FERC "has merely upheld, on a generic basis, a termination charge for those customers who are bound by existing contracts but wish to avoid their obligations." 202 F.3d at 400 (Pet. App. 240a). In response to Norwood's arguments that the CTC amendment violated Norwood's contract and legal rights, the court said:

> The termination charge is certainly a detriment but, absent a showing that its formula is any worse than contract damages, it merely spells out what would have been the law's remedy if Norwood had no option, but simply breached the existing contract.

Id. (Pet. App. 240a-241a). The court added:

> To whatever extent there was in fact a disputed issue regarding the termination charge calculation that necessitated a hearing.... *FERC suggested in its initial order that Norwood could file a section 206 complaint, 16 U.S.C. § 824e, challenging the substance of the contract termination charge... and presumably it can still do so....*

Id. at 401 (Pet. App. 243a) (citations omitted, emphasis supplied).

In a companion case, the First Circuit confirmed that it did not view the CTC Tariff filing as having established a charge owed by Norwood or the amount. *Town of Norwood*

---

which contained NEP's CTC rate computations. Order Accepting Amendment for Filing, *supra*, 83 F.E.R.C. at 61,724 and Attachment E (Pet. App. 281a-282a). The statement in FERC's Order that Norwood did not request a hearing was in error. (Pet. App. 280a).

v. New England Power Co., 202 F.3d 408, 419 (1st Cir. 2000) (emphasis supplied):

> FERC found the contract termination charge to be *in principle* a reasonable recovery of expected revenues less avoided costs....*The agency left the door open for future administrative challenges to both the contract termination charge* and the wholesale standard offer rate [offered to NEP's affiliates].

Accord, id. at 416 (FERC has "at most approved only the generic terms of the amended tariff.")

Norwood's FERC Complaint: Norwood filed a complaint at FERC, stating that the amount of NEP's claimed CTC was "unjust and unreasonable" under the Federal Power Act. (JA-0091-0174). FERC set Norwood's complaint for hearing. Hearing Order, *Town of Norwood, Mass. v. National Grid USA*, 104 F.E.R.C. ¶ 61,030 (2003) (Pet. App. 112a). In describing the CTC, FERC confirmed: "The CTC was based on an avoided cost concept that is similar to the lost revenues approach that the Commission approved in Order No. 888." *Id.* P 10 (footnotes omitted) (Pet. App. 116a). It held:

> Claims (B) to (F) of Norwood's complaint relate to the way in which NEPCO calculates the *CTC*. The Commission has approved the use of a CTC for the early termination of a contract and has accepted NEPCO's CTC formula, *but has not accepted the individual components of the CTC calculation*. While the Court of Appeals upheld the Commission's orders, it noted that Norwood could bring a complaint regarding the way in which NEPCO has calculated the CTC. *As*

> *the Commission has not approved the individual components used in NEPCO's calculation of Norwood's CTC, the Commission will set these claims (B through F) for hearing....*

Id. P 18 (footnotes omitted, emphasis supplied) (Pet. App. 120a-21a). Claims B through F included the justness and reasonableness of all CTC amounts, including the revenue factor, the estimated market value of the displaced power and the cap. *Id.* P 13. (Pet. App. 117a-119a).

At hearing, NEP's chief witness, Ms. Terry Schwennesen confirmed that the CTC rate had never been previously determined (JA-1868-69):

> Q. [Mr. Bennett, FERC Staff Counsel]: Don't the Respondents [NEP] indicate there that they agree that the level of the contract termination charge for Norwood has never been the subject of an evidentiary hearing before a commission or state or federal court?
> A. [Ms. Schwennesen]: Yes, it does.
>
> * * *
>
> PRESIDING JUDGE: I have not seen anything indicating that NEPCO is asserting res judicata as to the *level* of the CTC. Have I missed something?
> THE WITNESS [Ms. Schwennesen]: I don't think you're missing anything.

Hearing Transcript, April 15, 2004, at 421, 422. (JA-1868-1869.) The FERC Order on Initial Decision, 112 F.E.R.C. ¶ 61,099 at P 2 (2005) (Pet. App. 20a), discussed below, stated that FERC had accepted the CTC formula for filing, but reaffirmed that FERC "had not accepted the individual components in New England Power's calculation."

Proceedings before FERC: After hearing, the ALJ set the CTC at $16,925,796 plus interest. 107 F.E.R.C. ¶ 63,041 at PP 111, 142 (Pet. App. 194a, 209a). She found that NEP's fossil fuel plant divestiture was "known and measurable" when NEP filed its tariff and that "an adjustment is necessary to ensure that the CTC charge is not unjust, unreasonable, or unduly discriminatory as applied to Norwood." *Id.* P 62 and, generally, PP 62-71 (Pet. App. 162a-170a). However, the Commission reversed, setting the CTC amount at $71,881,517 (Order on Initial Decision, P 94 (Pet. App. 65a), plus interest, and an ineffective cap of $157,982,793 (*id.* P 75 (Pet. App. 58a)). FERC denied rehearing. Rehearing Order, 114 F.E.R.C. ¶ 61,187 (2006) (Pet. App. 67a-92a).

Although it ordered payment of the $72 million CTC, FERC did not find that NEP suffered any significant – or any – damages or losses from Norwood's cessation of its NEP power purchases. The record is uncontroverted that NEP sold its fossil fueled power plants at a $500 million premium over book value. (JA-1385-86, 1389, 1416.) In March, 1998, NEP announced that its separate nuclear unit sales would also allow it to recover its costs. (JA-1739-40.)[7] Further, Norwood presented unrebutted testimony that if NEP resold the Norwood power at actual market rates, the sales would have brought sufficient profit to eliminate any CTC charge, even under NEP's calculations. (JA-1510; 1442-50, 1706-07). Had Norwood remained a customer, NEP would have either had to retain plant, buy more expensive power than the contract price or otherwise arrange to serve Norwood.

---

[7] In the 1997 Annual Report of NEES, NEP's parent company, filed March 1998 with the Securities and Exchange Commission). NEES represented: "We are delighted to report that the purchase price will effectively recover our investments not only in our fossil and hydro plants, but in nuclear plants as well.") (JA-1739.)

Norwood argued that under the FPA the amount of the contract termination charge had to be "just and reasonable," and, as such, the charge was required to reflect NEP's costs or damages. (JA-0428-34, 0431, 0442-59, JA-0429-34, 0442-45.) Allowed revenues under the CTC reflected NEP's plant costs; if NEP could sell its plants, but charge Norwood as if it had not, NEP would collect twice: once through plant sales revenues and once through Norwood CTC payments. (JA-0437-38.)

Because the purpose of the cap was to prevent customers from paying more contract termination charges than their proportionate share of NEP plant costs and NEP has no costs for its sold plant, consistent with the ALJ's findings and FERC trial staff positions, Norwood argued that the cap had to be applied to account for NEP's plant sales. (JA-0442-44.) Norwood pointed out that Order No. 888, after which the contract termination charge was modeled, deducted for plant sales, although as in NEP's CTC formula applicable to Norwood, the CTC deduction was not stated directly in the Order No. 888 stranded costs formula. (JA-0433-34, 0443-44.) Additionally, Norwood said that, at a minimum, FERC had to test the validity of NEP's Market Value estimate against actual market prices or against the plant purchaser's market evaluation. (JA-0441.) Finally, Norwood contended that under the FPA the CTC as a whole (*i.e.*, the combination of the R factor, the M factor and the cap) had to reasonably reflect NEP's costs. (JA-0437-40, 0442, 0444-45.)

In the orders under review, FERC refused to consider the reasonableness of the formula's result as a whole or whether the components and cap, as applied, were "just and reasonable." It also held that it did not have to consider Order No. 888's reduction of stranded costs to account for plant sales. Thus, FERC never examined the CTC charge to ensure that its application resulted in a just and reasonable

amount *either* in 1998, when it approved the formula, or in 2005 and 2006, when it set the CTC amount.

First Circuit decision: The First Circuit affirmed FERC's orders on CTC issues. *Town of Norwood v. FERC*, 476 F.3d at 24-27 (Pet. App. 8a-16a). The court termed "the main thrust of Norwood's position" to be "that the CTC formula, as FERC reads it, is unlawful under the statute." *Id.* at 24 (Pet. App. 10a). Norwood claimed that the failure of FERC to consider NEP's asset divestitures or the actual value of power made the CTC not cost-based or "just and reasonable" because it would give NEP more than it would need to recover any losses from not selling power to Norwood. *Id.* However, the court held any such claims based on the reasonableness of the tariff to be *res judicata*, on the presumption that they could have been raised in 1998 when FERC approved the CTC tariff amendment for filing. 476 F.3d at 24-27 (Pet. App. 9a). The court nowhere questioned that NEP had suffered no or minimal damages or losses as a result of Norwood's termination.

The court also affirmed FERC's interpretation of the CTC. *Id.* It said that the CTC formula language did not require "credit for asset divestiture" or the Market Value factor to be trued-up. 476 F.3d at 24 (Pet. App. 8a-9a). It said that "when FERC approved the CTC tariff amendment, it expressly noted" differences between the proposed formula and the formula applicable to other NEP customers. *Id.*[8]

---

[8] NEP's CTC filing said that it "applies the lost revenues approach used in the Commission's Order No. 888 for the calculation of stranded costs." (JA- 1257.) NEP referred to "a critical difference" between the CTC and stranded costs formula that the CTC does not cover periods beyond customer existing contract terms and said that NEP did not plan to update Market estimates after termination. (JA-1257.) Beyond these sole specified differences, the CTC would have been presumed to follow the Order No. 888 stranded cost formula absent reason to do otherwise.

Before the court's decision, the Ninth Circuit decided *P.U.D.* and *P.U.C.*, holding that FERC must ensure that all FPA rates are "just and reasonable," giving "predominant weight" to rate impacts on the public. *Id.*, 471 F.3d at 1087-88. *Accord,* 471 F.3d at 1087-90. *P.U.C.*, 474 F.3d at 596, *see id.* at 591-592. On December 22, 2006, Norwood filed a FRAP 28j letter, stating:

> *P.U.D.-P.U.C.* rejects [the position] that FERC did not have to examine whether contract rates were "just and reasonable," where sellers entered into contracts under previously approved market rate authority against claims that petitioners should have challenged sellers' market rate authority earlier. *P.U.C.* at [594-95]; *P.U.D.* at [1079-86]. *P.U.D.-P.U.C.* holds that..." initial FERC approval was insufficient to ensure "just and reasonable" rates. *P.U.C.* at [594]; *P.U.D.* at [1079-80, 1077, 1079-86] (emphasis original). Claims in *P.U.D.-P.U.C.* parallel those here that FERC's initial CTC approval barred subsequent review of the CTC's justness and reasonableness. Where, as here, FERC admittedly did not approve or review the CTC components or rates when it accepted the CTC for filing, under *P.U.D.-P.U.C.* FERC was required to do so now.

The First Circuit did not refer to *P.U.D.* and *P.U.C.* Nor did it consider whether NEP's contract termination charge was cost based or "just and reasonable."

Order No. 888 holds, "If a stranded cost claim involves divestiture of assets, the amount of stranded costs associated with those assets would be the book value less the sale price," Order No. 888 at 31,842, which if applied here would have greatly reduced the CTC (*e.g.*, JA-1088-92).

REASONS FOR GRANTING THE WRIT

I. SUMMARY

The court below affirmed FERC's holding ordering Norwood, a town having approximately 15,000 electricity customers, to pay NEP a $72 million contract termination charge plus interest without ever having reviewed whether the charge was "just and reasonable" or whether NEP had costs as a result of Norwood's termination. This affirmance of this charge conflicts with recent Ninth Circuit cases, *Pub. Util. Dist. No. 1 of Snohomish County, Wash. v. FERC*, 471 F.3d 1053 (9th Cir. 2006) ("*P.U.D.*"), *Pub. Utils. Comm'n of Cal. v. FERC*, 474 F.3d 587 (9th Cir. 2006) ("*P.U.C.*"), and *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1012-13 (9th Cir. 2004), *petitions for cert. filed sub nom. Coral Power, L.L.C. v. Cal.,,* 75 U.S.L.W. 3355 (U.S. Dec. 28, 2006) (No. 06-888), *and* 75 U.S.L.W. 3410 (U.S. Feb. 5, 2007) (No. 06-1100) ("*Lockyer*"), which determine that FERC must ensure that all FPA rates, including rates previously entered into under market rate authorizations, must be "just and reasonable." If FERC and other regulatory agencies may depart from cost standards under "just and reasonable" statutes without proper justification, as the court below allowed, this will impact most regulated industries, including electricity and natural gas, and will adversely affect consumers of essential utility services nationwide.

Petitions for writs of *certiorari* are being filed or have been filed in *P.U.C.*, *P.U.D.* and *Lockyer*. If the Court grants review of those cases, it should grant review here. This case presents parallel issues to *P.U.D.*, *P.U.C.* and *Lockyer*, but not the issue whether FERC may upset existing contracts approved under FERC market rate authorizations. Granting Norwood's petition would permit the Court to consider the Court of Appeals' affirmance of a charge that was never examined for consistency with statutory "just and

reasonable" requirements, thereby permitting it to assess seller claims under both previously authorized contracts and previously approved FERC tariff provisions.

The Court of Appeals affirmed that Norwood owes NEP a $72 million charge where NEP had no or very little costs. Because of industry restructuring to adopt more competitive generation markets and other factors, FERC has been moving away from applying traditional cost standards to electricity pricing. This Court should determine the extent to which charges of jurisdictional companies under the FPA and other regulatory statutes governed by "just and reasonable" rate provisions must have a cost basis and where they do not, the boundaries of regulatory discretion.[9]

The court below held that FERC was not required to ensure that the contract termination charge that it set in the orders under review were "just and reasonable" because Norwood could have raised claims in 1998, when NEP filed the CTC, that the CTC formula and charge were unreasonable and, therefore, Norwood was precluded from raising them now. 476 F.3d at 24-26 (Pet. App. 10a-13a). FERC did not accept NEP's attempt to file the amount of the charge in 1998 when it approved NEP's "generic" CTC tariff amendment and did not determine the justness and reasonableness of the CTC formula components or rate. See Statement of Facts, pp. 6-9, *supra*. Therefore, it could not appropriately hold in 2007 that "just and reasonable" challenges to the charge was barred. An issue that was not before an agency does not create preclusion in a subsequent case. See Section III, *infra*. The Court should review the standards for applying *res judicata* under regulatory law and the extent to which a claim of *res judicata* can allow FERC

---

[9] See Pet. App. F, showing examples of the many statutory provisions that contain "just and reasonable" language.

or other regulatory agencies to avoid any review of the justness and reasonableness of rates.

Finally, FERC's allowance of a contract termination charge of $4,792 per customer before interest is so far beyond legal norms to warrant review. FERC orders the payment of up to $115 million without having a recognizable statutory basis.

II. *TOWN OF NORWOOD, P.U.D, P.U.C. AND LOCKYER* ARE IN A CONFLICT THAT SHOULD BE RESOLVED

There is a direct conflict between this case and the recent Ninth Circuit cases of *P.U.D.* and *P.U.C.* for which petitions for *certiorari* are being filed. In addition, there is a conflict with *Lockyer*, for which a petition and a cross-petition have been filed.

P.U.D. and *P.U.C.* held that FERC may not accept sellers' market rate contracts as "just and reasonable" under the FPA without ensuring that the markets were competitive at the time of the contracts' formation and that FERC must afford meaningful subsequent oversight. *P.U.D.*, 471 F.3d at 1061, 1076-77, 1080-1090; *P.U.C.*, 474 F.3d at 594-597. Only with such oversight "can FERC meet its statutory duty to ensure that *all* rates are 'just and reasonable'" *P.U.D.*, 471 F.3d at 1081 (emphasis in original). The court held further that contract rates could not be made effective without assurance that they were "just and reasonable." *P.U.D.*, 471 F.3d at 1056, 1074. *See P.U.C.*, 474 F.3d at 594-96. It held that even contract rates entered into pursuant to a FERC approved market rate regime could be retroactively corrected unless it could be shown that customers had a meaningful opportunity to test whether the markets were competitive at the time the contracts were entered.

By contrast, in *Norwood* the First Circuit affirmed FERC's approval of NEP's $72 million contract termination

charge, although (1) NEP suffered no or minimal losses from its loss of Norwood as a customer and (2) when FERC accepted NEP's CTC filing in 1998, FERC did not accept rates associated with the charge for filing and did not rule on the justness and reasonableness of the CTC components or charge. Therefore, FERC's ordered charge had no discernible cost basis and had not been determined to be "just and reasonable," now or previously.

Under *P.U.D.* and *P.U.C.*, the $72 million CTC plus interest ordered in *Norwood* could not have been upheld without a showing that the justness and reasonableness of the components could have been examined for reasonableness at the time the CTC tariff amendment was filed or that the formula could have been expected to yield a result that equated to NEP's losses. In view of the Ninth Circuit's emphasis on FERC's oversight role, FERC would have had to ensure that the formula components and the amount of the charge were "just and reasonable" at the only time it had them before it for review – in this case. Certainly, the First Circuit approval of FERC's application of *res judicata* would not have occurred in the Ninth Circuit, which had refused to lock in contracts that had been previously approved under grants of market rate authority.

The First Circuit's affirmance of FERC's failure to consider that NEP's revenues from its plant sales and other factors eliminated or nearly eliminated any harm to NEP from Norwood's cessation of service is in complete opposition to *P.U.D.* and *P.U.C.* *P.U.D.* recognizes that the FPA, under Sections 205 and 206, 16 U.S.C. §§ 824d and 824e, "requires FERC to regulate public utilities for the benefit of consumers." *P.U.D.*, 471 F.3d at 1058.

Multiple petitions for writs of *certiorari* will likely be filed in *P.U.D.* and *P.U.C.* Norwood believes that the Ninth Circuit decisions were decided consistently with the FPA and

that their holdings should be applied to Norwood. But regardless of whether this Court grants *certiorari* in those cases, the writ in this case should be granted both because of the conflict between the circuits and because of the First Circuit's failure to correct FERC's refusal to apply the "just and reasonable" standard.

If the Court grants *certiorari* in *P.U.D.* and *P.U.C.*, this would provide additional reasons for granting *certiorari* here. Like *P.U.D.* and *P.U.C.*, this case raises issues of the extent to which prior approvals can justify FERC's not considering the justness and reasonableness of jurisdictional rates, but unlike *P.U.D.* and *P.U.C.*, it does not involve contracts entered into under previously granted market rate authority. Therefore, *Norwood* does not call into question whether contract rates should be revisited because of allegedly legitimate seller expectations that their market rate contracts would not be disturbed. Because *Norwood* presents a straight-forward jurisdictional charge of great amount that has never been tested against the "just and reasonable" statutory standard, it provides a different context to review FERC's responsibilities under its "just and reasonable" mandate, permitting the Court to draw possible delineations among FERC's statutory responsibilities.

Finally, a petition and cross-petition have also been filed in *Lockyer*, which involve similar issues of FERC's responsibilities to ensure "just and reasonable" rates that are raised in *P.U.D.* and *P.U.C.* These petitions additionally point to the importance of questions of whether and to what extent FERC is departing from its core responsibilities to ensure "just and reasonable" rates. For reasons expressed above, if the Court grants the writ in *Lockyer*, it should also do so here. *Norwood* presents the most direct case of FERC's departure from setting "just and reasonable" cost

based rates under non-market rate circumstances – but in *Norwood* FERC was affirmed.

III. WHERE ISSUES ARE LEFT OPEN FOR FUTURE CONSIDERATION, FERC MAY NOT APPLY *RES JUDICATA* TO AVOID EXERCISING BASIC STATUTORY RESPONSIBILITIES

The lower court's affirmance is based on an erroneous application of preclusion doctrine. The court said that when NEP filed the CTC in 1998, Norwood could have raised the issue of whether the CTC was "just and reasonable" under the FPA and that, therefore, FERC did not have to examine the reasonableness of the charge in this proceeding. *Town of Norwood*, 476 F.3d at 24-26 (Pet. App. 10a-13a). However, FERC set the amount of the CTC that Norwood owes *in this proceeding* and not earlier when it approved NEP's "generic" CTC tariff amendment filing. In 1998 FERC did not accept NEP's attempt to file the amount of the charge or examine whether the charge was "just and reasonable." Nor did it then determine the justness and reasonableness of the CTC formula components. Thus, it did not examine whether the CTC formula components were "just and reasonable" – leaving the amount and reasonableness of the charge to future determination. *Norwood I*, 202 F.3d at 401 (Pet. App. 240a-243a). Needless to say, if the formula components are not "just and reasonable," the overall charge will be not be reasonable – except as a result of accident.

The court's misapplication of *res judicata* has allowed FERC to avoid entirely its statutorily required "just and reasonable" examination. By not having accepted the amount of the charge for filing in 1998 and then ruling that Norwood was precluded from examining the reasonableness of the charge in 2005 and 2006, FERC and the court below precluded *any* review of the charge's justness and

reasonableness. If preclusion is to be applied so that many millions of dollars of charges can never be examined, this presents questions justifying this Court's review.

The Restatement of Judgments, upon which the First Circuit relied in making its *res judicata* determination, explicitly recognizes that the doctrine does not apply where a plaintiff's right to maintain the second action has been reserved. When "the court in the first action has expressly reserved the plaintiff's right to maintain the second action" "the general rule ... does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action ...." Restatement (Second) of Judgments § 26 (1982) ("Exceptions to the General Rule Concerning [Claim] Splitting"). This requirement is part of the broader mandate that a precondition of the application of *res judicata* in a second proceeding is that the parties had a full and fair opportunity to litigate their claim in the first. *Johnson v. De Grandy,* 512 U.S. 997, 1005 (1994) (holding that full and fair opportunity to litigate requirement of *res judicata* is not satisfied where a previous determination expressly reserved the right to bring a challenge in a second proceeding); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 480-81 & n.22 (1982); *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966).

In its 2000 opinion, the First Circuit presumed "that Norwood could file a section 206 complaint 'challenging the substance of the contract termination charge.'" 476 F.3d at 23 (Pet. App. 11a), *quoting Norwood I*, 202 F.3d at 401 (Pet. App. 6a-7a).[10] Having reserved Norwood's right to file an

---

[10] FERC's refusal to examine the actual amount of the contract termination charge or to fix the formula components in 1998 is unsurprising. The Order No. 888 stranded cost formula on which the CTC is based does not itself award stranded costs:

> Order 888 awards stranded costs to no one. It does

FPA § 206 challenge to the justness and reasonableness of the CTC, the court may not, consistent with the Restatement of Judgments upon which it relies, assert *res judicata* to preclude Norwood's making this just and reasonable challenge.

The First Circuit holding on *res judicata* allows charges that depart from statutory standards. In ordering the § 206 hearing below and in its Order on Initial Decision, FERC admits that it had never previously ruled on the justness and reasonableness of the CTC components which generated the charge or on the charge itself. *Norwood I*, 202 F.3d at 400-401 (Pet. App. at 240a-243a); Order on Initial Decision, 112 F.E.R.C. ¶ 61,099 at PP 2, 8 (2005) (Pet. App. 21a, 23a). Thus, whether NEP's application of the CTC formula, including its interpretation and implementation, is "just and reasonable" was not and could not have been litigated in

---

> nothing more than establish a mechanism by which utilities may seek to recover stranded costs. To recover stranded costs, a utility must demonstrate its continued expectation of service at an evidentiary hearing. The customer may appear at that hearing and, through evidentiary submissions of its own, attempt to demonstrate that the utility had no such expectation. Only after such a hearing may FERC decide whether a utility can recover stranded costs and, if so, how much.

Transmission Access Policy Study Group v. FERC, 225 F.3d 667, 702 (D.C. Cir. 2000), *aff'd sub. nom. N.Y. v. FERC*, 535 U.S. 1 (2002). In implementing the stranded costs formula, FERC allows for changes to reflect subsequent events or to achieve a just charge. *City of Alma, Mich.*, 96 F.E.R.C. ¶ 61,163, 61,719, 61,724 (2001), *reh'g denied*, 97 F.E.R.C. ¶ 61,147 (2001); *City of Las Cruces, N.M. v. El Paso Elec. Co.*, 87 F.E.R.C. ¶ 61,201, 61,758-59 (1999). This precedent is consistent with FERC's 1998 ruling and *Norwood I* that Norwood could file a subsequent complaint challenging the substance of the CTC. *Norwood I, supra.* Order Accepting CTC Amendment, 83 F.E.R.C. at 61,274 (Pet. App. 281a-282a).

FERC's Order Accepting CTC Amendment, 83 F.E.R.C. ¶ 61,174 (1998) (Pet. App. 275a-282a) and in *Norwood I* (Pet. App. 236a-255a). There, at issue was whether a departing NEP customer is required to pay a CTC based upon a *generic* tariff formula rather than the validity of the components or the ultimate charge. And, again, in affirming FERC's 1998 decision, the court of appeals presumed the correctness of *FERC's* suggestion *"that Norwood could file a section 206 complaint"* as to "the substance of the contract termination charge." 202 F. 3d at 401 (emphasis supplied) (Pet. App. 243a). When Norwood filed for such a hearing, FERC ruled that it "had 'not [previously] approved the individual components used in [the] calculation' of Norwood's CTC" and set the elements of the CTC formula for hearing. 476 F.3d at 25 (Pet. App. 11a). But after the hearing, in a classic example of hide the ball, FERC determined, and the First Circuit affirmed, that the Commission did not have to examine whether the components or charge were "just and reasonable" on grounds that Norwood should have litigated in 1998 the amount which was then not accepted for filing or approved. Norwood has thus been faced with the essence of an inadequate opportunity to litigate its claims. *Kremer v. Chemical Constr. Corp., supra,* 456 U.S. at 481 n.22.

The use of *res judicata* as a bar notwithstanding the absence of a full and fair opportunity to litigate is especially troubling because of the administrative context in which it occurs. The special role of agencies as protectors of the public interest, and the unique policy and procedural context in which agency proceedings occur, are such that preclusion is to be applied more judiciously, rather than more broadly, in the agency context:

> [C]onventional *res judicata* doctrines are not always applicable in the administrative realm....The sound

> view is to use the doctrine of *res judicata* when the reasons for it are present in full force, to modify it when modification is needed, and to reject it when the reasons against it outweigh those in its favor.

Landsdale v. FPC, 494 F.2d 1104, 1114 n.45 (D.C. Cir. 1974) (internal citations omitted), *quoting* 2 Kenneth Culp Davis, *Administrative Law Treatise* § 18.02, at 548 (1958).

In particular, this Court has held that *res judicata* has limited rate case application. *Tagg Bros. v. United States*, 280 U.S. 420, 445 (1930). Accordingly, the First Circuit's expansion of the *res judicata* doctrine in circumstances of significant procedural inadequacy to permit evasion of the FPA-required just and reasonable examination of a crushing cost-shift to consumers warrants this Court's review. The First Circuit's expansive, erroneous and rigid use of *res judicata* frustrates the FPA's explicit requirements, and unjustifiably subverts a central policy of FERC's regulatory regime.[11] The circumstances in which *res judicata* may appropriately be applied to agency determinations is the subject of a complex and evolving area of law. *See* II Richard J. Pierce, *Administrative Law Treatise* § 13.3 (Aspen 4th ed. 2002); Davis, *supra*, § 18. In light of this, the expansive application of *res judicata*, especially in an administrative agency context, to short circuit enforcement of statutes demands Court consideration.

---

[11] Even if FERC had considered the justness and reasonableness of the charge before, it has an inherent ability to change policy and to adjust to new facts and circumstances. *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1078-80 (1987) (en banc), *cert. denied*, 485 U.S. 913 (1988). Its failure to do so here where it had held a full hearing and had had a clear record that NEP had minimal or no losses was arbitrary. APA, § 10(e), 5 U.S.C. § 706(e); *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48-49 (1983).

As a matter of regulatory jurisprudence, FERC, having refused to accept NEP's proposed CTC amount for filing in 1998, could not properly claim that challenges to the amount on "just and reasonable" grounds were barred in the present case. NEP did attempt to file the charge with its CTC filing. (JA-1269-1275). However, because FERC did not accept the calculations and amount of the charge for filing, under the "filed rate doctrine," they could not become legally effective. *E.g., Maislin Indus. U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126-136 (1990); *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 576-85 (1981); *Elec. Dist. No. 1 v. FERC*, 774 F.2d 490, 492-493 (D.C. Cir. 1985); *accord, Pub. Serv. Co. of N.M. v. FERC*, 832 F.2d 1201, 1222-1225 (10th Cir. 1987). Norwood could not be barred from challenging the justness and reasonableness of the charge in this case where the amount of the charge was determined and made effective.

The First Circuit's expansive use of *res judicata* to allow the agency to avoid making a "just and reasonable" determination as to a utility's charge stands in direct contrast to the Ninth Circuit's holdings emphasizing that the just and reasonable determination must be made as to every rate, creating a split among the circuits with respect to the proper role of the just and reasonable standard in the regulatory scheme. *P.U.D.*, 471 F.3d at 1074; *P.U.C.*, 474 F.3d at 594-97. The ruling of the court below that preclusion may override implementation of Congress' statutory command raises important questions of the role of preclusion in regulatory law.

There is no legitimate preclusion issue to prevent this Court from resolving the circuit conflict and determining whether FERC is correctly interpreting and implementing its statutory responsibilities. Having been set in this case, the CTC rate and components were required to be made "just and reasonable."

Finally, the court below and FERC's rulings on the preclusion doctrine are in opposition to the requirement of rate regulatory agencies to ensure that jurisdictional rates and charges are "just and reasonable." This Court should consider the appropriate exercise of agency discretion in applying preclusion doctrine where the results may conflict with agency statutory obligations.

IV. THIS COURT SHOULD REVIEW THE FIRST CIRCUIT'S HAVING ALLOWED FERC TO ABANDON ITS STATUTORY DUTY TO SET A "JUST AND REASONABLE" CHARGE

The FPA and many other regulatory statutes contain requirements that rates and charges be "just and reasonable" or variants of this standard.[12] The standard has been established for over a century. However, in *Norwood* the First Circuit allowed FERC to set a charge which in no sense meets the requirement. The court's interpretation of regulatory law to allow FERC to order customers to pay suppliers many millions of dollars of charges, outside of situations where FERC permits sellers to charge market rates, where those charges have never been examined for their consistency with statutory norms presents crucial questions for Court review.

---

[12]The "just and reasonable" or nearly identical rate and charge requirements are contained in numerous federal and state statutes. *See* excerpts from federal statutes in Pet. App. F.

> It is a general doctrine of American law, almost universal in its application to public utility companies operating under special franchises or certificates of convenience and necessity, that these companies are under a duty to offer adequate service at reasonable (or just and reasonable) rates.

James C. Bonbright *et al.*, *Principles of Public Utility Rates* 76 (2d ed. 1988).

The "just and reasonable" language stems from the 1906 Hepburn Act Amendment to the Interstate Commerce Act of 1887. ch. 3591, 34 Stat. 584 (1906). *Farmers Union Cent. Exch. Inc. v. FERC,* 734 F.2d 1486 1504-06 (D.C. Cir. 1984), 734 F.2d at 1504-06. *See Sithe New England Holdings, LLC v. FERC,* 308 F.3d 71, 76, n.2 (1st Cir. 2002). Even before the Hepburn Act, companies "affected with the public interest" had been subject to rate regulation to prevent excessive or discriminatory charges. *Munn v. Ill.*, 94 U.S. 113, 125-27 (1876).[13] Contemporaneous law review articles with the Hepburn Act recognized that "just and reasonable" rates were "an exercise of police power...to prevent exorbitant and oppressive rates of charge." Frank M. Cobb, "*Reasonableness of Maximum Rates as a Constitutional Limitation on Rate Regulation*," 21 Harv. L. Rev. 175, 180-81 (1907-08). "The meaning of 'just and reasonable' charge has a clearly defined meaning in our law, and signifies a charge which yields a fair and proper rate of profit on the property actually invested in the business." James Wallace Bryan, *The Constitutional Aspects of the Senatorial Debate on the Rate Bill*, 41 Am. L. Rev. 801, 823 (1907).

There is little question that those who passed statutes containing "just and reasonable" language were concerned about excessive seller prices. *Farmers Union*, 734 F.2d at 1504-06. *See, e.g., Smyth v. Ames*, 169 U.S. 466 (1897) ("The basis of all calculations as to the reasonableness of rates to be charged...must be the fair value of the property being used by it for the convenience of the public."). To be sure, the *Smyth* fair market value standard predated *Hope*'s

---

[13] *Munn*, at 94 U.S. at 127, cites Lord Chief Justice Hale in *De Portibus Maris* as holding that the duties for wharfs and cranes that are "affected with a public interest...must be reasonable and moderate." 1 Harg. Law Tracts 78 (1787).

original cost less depreciation property valuation standard *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944)) and is deemed less rigorous. But the fair value standard was tied to the costs of providing service, including a fair return associated with property dedicated to public service. FERC's holding that Norwood must compensate NEP when NEP suffered no or minimal losses is contrary to the text, history and purpose of the "just and reasonable" statutory language, as it has been previously understood.

In applying "just and reasonable" rate requirements, this and other courts have recognized the central place of costs in measuring whether rates are just and reasonable. *Permian Basin Area Rate Cases,* 390 U.S. 747, 757 n.10 (1968). *Farmer's Union*, 734 F.2d at 1502-10, 1520, 1525-27 (primary standard for determining whether rates and charges are just and reasonable is cost); *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1302-04 (D.C. Cir. 1992); *Sithe Independence Power Partners, L.P. v. FERC,* 285 F.3d 1, 5 (D.C. Cir. 2002). "'[E]ach deviation from cost-based pricing [must be] found to be not unreasonable and to be consistent with the Commission's [statutory] responsibility." *Farmers Union*, 734 F.2d at 1502, *quoting Mobil Oil Corp. v. FPC,* 417 U.S. 283, 308 (1974) (brackets in original). Furthermore, customers cannot generally be charged for costs they do not cause. *K N Energy, Inc.*, 968 F.2d at 1300. Norwood did not cause NEP's non-existent losses.

The court below permits FERC to abandon cost regulation by allowing a charge without examining whether it reflects NEP's actual costs. "Just and reasonable" ratemaking, however, does not allow compensation for non-existent or phantom costs, *Acker v. United States*, 298 U.S. 426, 429-31 (1936); *Midwestern Gas Transmission Co. v. FPC*, 388 F.2d 444, 446 (7th Cir. 1968); *Ala.-Tenn. Natural Gas Co. v. FPC*, 359 F.2d 318, 327, 331 (5th Cir. 1966); *El*

Paso Natural Gas Co. v. FPC, 281 F.2d 567, 571-573 (5th Cir. 1960). Absent a justification for its using a non-cost standard, under the FPA the CTC was required to be based upon NEP's incurred costs due to Norwood's contract termination. FPA §§ 205-206, 16 U.S.C. §§ 824d-825e. *See, e.g., Sithe Independence Power Partners,* 285 F.3d at 4 (rates should be based on the costs of providing service to the utility's customers, plus a just and fair return on equity); *Ala. Elec. Coop., Inc. v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982) ("While neither statutes nor decisions of this court require that the Commission utilize a particular formula or a combination of formulae to determine whether rates are just and reasonable, it has come to be well established that electrical rates should be based on the costs of providing service to the utility's customers, plus a just and fair return on equity."); *NSTAR Elec. & Gas Corp v. FERC,* No. 05-1362, slip op. at 16-17 (D.C. Cir. Mar. 9, 2007) (FERC must examine the justness and reasonableness of independent transmission operator rates for running generation to alleviate congestion *taking into account* actual *cost data for the relevant time period.*)

As this Court made clear in *Hope*, ratemaking orders are to be judged by whether "viewed in [their] entirety," their end result" meets the [statutory] requirements of the Act." 320 U.S. at 602-03 (internal quotations omitted). However, rather than examine whether NEP had costs from Norwood's termination, FERC determined that it may order Norwood to pay NEP up to $115 million including interest, *knowing* that the formula inputs that it used were wrong. This judgment of FERC and of the court below is contrary to the very *essence* of the FPA and is "arbitrary and capricious" under the APA,

§ 10(e), 5 U.S.C. § 706(e); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).[14]

Electric restructuring and restructuring in other industries have provided a market structure where there have been recent departures from traditional cost standards.[15] *See Lockyer*, 383 F.3d at 1012-13. With deregulation has come a loosening of FERC's interpretation and implementation of statutory standards that affects virtually all ratepayers. Indeed, NEP's plant sales, the Norwood contract termination and the CTC arose from restructuring.

Norwood illustrates FERC's reliance on prior generic approvals to refuse to closely examine rates and charges. This may result from FERC's recent, less strict adherence to traditional cost standards. FERC's actions have national impacts. "Just and reasonable" and similar language is contained in many federal and state statutes. (Pet. App. F) If FERC can interpret the FPA "just and reasonable" language to permit $72 million of charges by refusing to examine

---

[14] In 2000 the First Circuit upheld FERC's acceptance of NEP's "generic" CTC filing, stating that Norwood could not be hurt because the charge would not be "any worse than contract damages." *Norwood I*, 202 F.3d at 400 (Pet. App. 240a). The charge could not be anything other than arbitrary if it were for more than damages, but FERC refused to consider the issue. *See id.* at 400 (Pet. App. 241a). The sale of the plant mitigated damages, a fact that both FERC and the First Circuit ignored.

[15] Electric power is one of the largest industries in the United States. It provides an essential service whose costs permeate the economy. In 2005, the latest year for which data are available, the industry earned more than $298 billion in revenue from sales to ultimate customers, surpassing other industries such as pharmaceuticals, airlines and natural gas. Edison Elec. Inst., *Key Facts About the Electric Power Industry* 3 (2007), *available at* http://www.eei.org/industry_issues/industry_overview_and_statistics/nonav_key_facts/KeyFacts_Web.pdf. Other regulated industries subject to the "just and reasonable" rate standard are likewise of great importance to the public and our economy.

whether the charges have a cost basis, the statutory language becomes devoid of meaning. FERC and other agencies can order transfers of money without limit.

The importance of regulated industries to the economy and to millions of individuals underscores the importance of this Court's review of whether and in what contexts the traditional "just and reasonable" standard should be adhered to or modified. The *Norwood* departure from enforcement of the cost standard gives the Court an opportunity to review this question in a context that is implicated by restructuring and, frankly, in a context that allows the Court to make clear, if it agrees, that the Congressional standard must be enforced.

V. THE SEVERE HARM TO NORWOOD JUSTIFIES GRANTING THE WRIT

The First Circuit affirmed FERC orders requiring that Norwood pay NEP a $72 million CTC plus interest – $4,792.00 for each customer without interest and up to $7,667 at FERC's ordered interest rate. Although the Court does not usually grant review because of the impact of lower court error on particular parties, here NEP had no or minimal costs to justify the charge. The devastating impact of this decision on Norwood's public warrants review.

CONCLUSION

This petition for a writ of *certiorari* should be granted.

Respectfully submitted,

ROBERT A. JABLON*
DANIEL I. DAVIDSON
SHARON COLEMAN
* *Counsel of Record*
SPIEGEL & MCDIARMID
1333 New Hampshire Ave., NW
Washington, DC 20036
202-879-4000

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

Nos. 06-1658, 06-2054

TOWN OF NORWOOD, MASSACHUSETTS,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

NEW ENGLAND POWER COMPANY,
Intervenor.

Heard Dec. 6, 2006
Decided Feb. 2, 2007

Before BOUDIN, *Chief Judge*, CYR, *Senior Circuit Judge*, and LIPEZ, *Circuit Judge.*

BOUDIN, *Chief Judge.*

The Town of Norwood, Massachusetts ("Norwood"), which operates a municipal electric system serving local businesses and residents, seeks review of an order of the Federal Energy Regulatory Commission ("FERC"). The order sustained a contract termination charge contained in a tariff previously filed by New England Power Company ("NEPCO"). The background events have been the subject of prior litigation in this court, principally in *Town of Norwood v. FERC* ("*Norwood I*"), 202 F.3d 392 (1st Cir.2000), *cert. denied*, 531 U.S. 818, 121 S.Ct. 57, 148 L.Ed.2d 24 (2000).

For many years, NEPCO was a major power wholesaler in New England. It operated generating plants and a trans-

mission network, and sold power wholesale to affiliated distribution companies (such as Massachusetts Electric Company, which served Massachusetts, and Narragansett Electric Company, which served Rhode Island) as well as to non-affiliated distributors like Norwood. Service to Norwood was provided under a long-term requirements contract of a kind then common in the utilities industry.

The contract, which began in 1983 and thereafter was extended by Norwood until October 2008, required NEPCO to supply, and Norwood to purchase, Norwood's power requirements from NEPCO at rates provided by NEPCO's Tariff No. 1. The contract could be terminated by Norwood without penalty but only upon seven years' prior notice. The present litigation arises out of NEPCO's action in providing, and Norwood's decision to exercise, a new option permitting customers to terminate their contracts early.

Beginning in late 1996, in response to legislative and regulatory initiatives to promote competition and consumer choice in the electric power industry, NEPCO made a series of regulatory filings. Among these were settlements offered by NEPCO to NEPCO's distributor customers-both affiliates and non-affiliates (including Norwood)—permitting them to terminate their NEPCO requirements contracts earlier than otherwise permitted, upon payment of a contract termination charge.

The aim was to allow distributors flexibility to choose new suppliers while permitting NEPCO to recover its "stranded costs"—that is, investments made by NEPCO to meet the projected long-term requirements of its distributor customers.[1]

---

[1] *See Norwood I*, 202 F.3d at 399. *See also* Order No. 888, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, 61 Fed.Reg. 21,540, 21,628 (1996) (rule codified as revised at 18 C.F.R. pts. 35 & 385).

The proposed settlement terms also provided that NEPCO would offer its affiliates, but not Norwood, low (but gradually escalating) "wholesale standard offer" rates for power without the need for a contract; the affiliates were required to offer corresponding retail standard offer rates to their retail customers, but Norwood, as a municipal utility, was not. Mass. Gen. Laws ch. 164, § 47A.

Additionally, as part of its restructuring, NEPCO sought approval from FERC to sell virtually all of its non-nuclear generating facilities. The buyer, USGen New England, Inc., agreed to assume responsibility for providing the "wholesale standard offer" service to NEPCO's affiliates who terminated, and agreed not to raise rates for NEPCO's remaining distributor customers, including Norwood. *New Eng. Power Co.*, 1998 WL 89673, 82 F.E.R.C. 61,179, at 61,658-60 (1998) ("*New Eng. Power VII*"), *reh'g denied*, 1998 WL 385144, 83 F.E.R.C. 61,275 (1998) ("*New Eng. Power VIII*").

FERC approved the settlement offers and divestiture over Norwood's objection.[2] NEPCO's three affiliated customers and three of its unaffiliated municipal customers opted to accept NEPCO's settlement offer, to terminate early, and to pay the contract termination charge. Other non-affiliates opted to continue to purchase their power requirements from NEPCO at Tariff No. 1 rates through the contractual seven-year notice period for termination.

Norwood was unwilling to take either course of action. It did not want to continue buying power at Tariff No. 1 rates

---

[2] *See New Eng. Power Co.*, 78 F.E.R.C. 61,080 (1997) ("*New Eng. Power I*"); *New Eng. Power Co.*, 80 F.E.R.C. 63,003 (1997) ("*New Eng. Power II*"); *New Eng. Power Co.*, 81 F.E.R.C. 61,281 (1997) ("*New Eng. Power III*"), *reh'g denied*, 83 F.E.R.C. 61,265 (1998) ("*New Eng. Power IV*"); *New Eng. Power VII*, 82 F.E.R.C. at 61,656. *See also New Eng. Power*, 1998 WL 203156, F.E.R.C. 61,085 (1998) ("*New Eng. Power V*"); *New Eng. Power Co.*, 81 F.E.R.C. 61,334 (1997) ("*New Eng. Power VI*").

when its distributor "competitors" had been offered lower non-contract rates; it viewed such an arrangement as discriminatory. Nor did it want to pay a contract termination charge for NEPCO's stranded costs; because it purchased its transmission services from Boston Edison, not NEPCO, it fell outside the stranded cost obligations imposed by FERC under Order No. 888.[3]

Instead, Norwood notified NEPCO on March 4, 1998, that on April 1 it would unilaterally terminate its contract with NEPCO—without giving the required seven years' notice-and switch to a different power supplier. NEPCO then filed a tariff amendment to its Tariff No. 1 permitting any of its remaining distributor customers, including Norwood, to terminate their requirements contracts on thirty days' notice upon the payment of a contract termination charge ("CTC") whose formula was specified in the tariff amendment. *Norwood I*, 202 F.3d at 397.

This CTC was calculated using a formula that would enable NEPCO to recover the revenues that it would have collected had a terminating customer continued to pay the tariff rate then in effect through the end of the contract term. The CTC equaled the number of years remaining on the contract (L) multiplied by the difference between the expected annual revenue from the terminating customer based on the rates in effect at the time of termination (R)[4] and the

---

[3] Order No. 888 obligated power companies to transmit ("wheel") power for customers which had purchased both power and transmission services from a single company, but who now wished to purchase power from another provider; and it obligated such customers to compensate for any resulting stranded costs. Because Norwood had bought power but not transmission services from NEPCO, it fell outside the terms of Order No. 888. *Norwood I*, 202 F.3d at 398-99.

[4] More precisely, R was to equal Total Revenue minus Transmission Revenue. Total Revenue was to "equal the annual average of revenues received by [NEPCO] from [the terminating customer] over three years

estimated market value of the released capacity (M); that is, CTC = L x(R-M). The CTC was capped so as not to exceed the terminating customer's contribution to NEPCO's fixed power supply costs; the tariff defined that contribution as L multiplied by the difference between R and NEPCO's annual average fuel costs with respect to the customer.

This CTC was in several respects less favorable than the contract termination charge applied to settling customers: it did not provide the terminating customer a credit for the recovery of costs associated with NEPCO's business, for example, through the profitable divestiture of generating plants; and it did not update ("true-up") the formula values to reflect actual, rather than projected, market values for released capacity. *New Eng. Power Co.*, 1998 WL 246647, 83 F.E.R.C. 61,174, at 61,723 nn. 5, 13 (1998) ("*New Eng. Power IX*"), *reh'g denied*, 1998 WL 452339, 84 F.E.R.C. 61,175 (1998) ("*New Eng. Power X*"); *New Eng. Power V*, 1998 WL 203156, 83 F.E.R.C. at 61,419 n. 5.

In proceedings before FERC, Norwood objected to the tariff amendment on a number of grounds, including claims that it violated the "stranded cost recovery" provisions of FERC Order No. 888, and that the disparities between the CTC offered to Norwood and the CTC offered to settling customers constituted an "undue preference" in violation of the Federal Power Act. 16 U.S.C. § 824d(b) (1994). Norwood also sought an evidentiary hearing on the reasonableness of the CTC amount (which it estimated at $78 million). *Norwood I*, 202 F.3d at 401.

---

under the presently effective rates . . . In the event that the rates paid by the Customer . . . [had] changed during the three-year period, Total Revenue shall be determined using the Customer's revenue for the 12 months" preceding termination. Transmission Revenue referred to the annual average revenue credited to the customer for transmission services performed by a third party. The focus of this appeal is on the Total Revenue component of the R value.

FERC rejected Norwood's claims, found the tariff amendment to be "reasonable," *New Eng. Power IX*, 1998 WL 246647, 83 F.E.R.C. at 61,723, and on rehearing refused to provide an evidentiary hearing because "no party [had] raised any issue of material fact." *New Eng. Power X*, 1998 WL 452339, 84 F.E.R.C. at 61,920. FERC noted that Norwood could file a section 206 complaint[5] arguing that the underlying contract was no longer reasonable and that Norwood should be able to break it without paying the amounts owed under it. *New Eng. Power IX*, 1998 WL 246647, 83 F.E.R.C. at 61,724.

Norwood I affirmed FERC's decision, holding *inter alia* that Order No. 888 did not by its terms apply to Norwood, 202 F.3d at 399, and that the disparity between Norwood's CTC and the contract termination charge of settling customers did not constitute an "undue preference." *Id.* at 402. At several points Norwood's present appeal appears to attempt to relitigate these two issues, but in these respects it is foreclosed by our prior adjudication. *Springfield Television Corp. v. FCC*, 609 F.2d 1014, 1019 (1st Cir.1979).

We also upheld the CTC formula as designed "to cover certain projected losses to New England Power caused by *not* supplying electricity after preparing to do so, calculated based on rates already approved by FERC" and said that Norwood had failed to show any factual dispute requiring an evidentiary hearing. *Norwood I*, 202 F.3d at 401. However, we left open the possibility that Norwood could file a section 206

---

[5] Section 206 of the Federal Power Act, 16 U.S.C. § 824e, provides a procedure for filing a complaint with the Commission that a "rate [or] charge . . . charged . . . by any public utility . . . is unjust, unreasonable, unduly discriminatory or preferential." If after a hearing the Commission agrees, it "shall determine the just and reasonable rate [or] charge . . . to be thereafter observed and in force, and shall fix the same by order."

complaint "challenging the substance of the contract termination charge." *Id.*[6]

Norwood declined to pay the termination charge and, faced with state court proceedings to recover amounts due under the contract, Norwood filed a section 206 complaint with FERC in 2002, alleging (among other things) that NEPCO erroneously calculated the CTC and CTC cap by relying on incorrect R and M values. In particular, Norwood claimed that the R value should have been reduced to reflect NEPCO's profitable divestiture of its non-nuclear generating plants, that the M value should have been "trued-up" to reflect actual, post-termination market values, and that these omissions were unreasonable under section 206.

The Commission set Norwood's claims for a hearing, saying that it had "accepted NEPCO's CTC formula, but ha[d] not accepted the individual components of the CTC calculation." *Town of Norwood v. Nat'l Grid USA*, 104 F.E.R.C. 61,030, at 61,074 (2003) ("*Nat'l Grid I*"). Before the ALJ, Norwood also argued belatedly that the interest rate of 18 percent applied by NEPCO to overdue CTC payments was contrary to the tariff amendment and, since the rate was in excess of NEPCO's cost of money, "unjust [and] unreasonable." 16 U.S.C. § 824e.

The ALJ accepted Norwood's argument that it should get a reduction in the R value figure to reflect the non-nuclear plant divestitures[7] but rejected its other claims. On review, the

---

[6] In a companion case, Norwood alleged a breach of contract and antitrust violation by NEPCO. We affirmed the district court's dismissal of these claims, except for one antitrust claim that we remanded. *Town of Norwood v. New Eng. Power Co.* ("*Norwood II*"), 202 F.3d 408 (1st Cir.2000), *cert. denied*, 531 U.S. 818, 121 S.Ct. 57, 148 L.Ed.2d 24 (2000).

[7] The ALJ held that the CTC formula could be read to suggest that the preceding twelve months' revenue was simply a "starting point" in fixing the R value (see note 4, *above*), and that a downward adjustment-in the

Commission reversed the ALJ as to the credit for plant divestitures, ruling (1) that the language of the CTC formula did not provide for an adjustment for divestiture of assets, and (2) that the disparity between the CTC formula applied to Norwood and the contract termination charge offered to settling customers was not an undue preference because the parties were not similarly situated.[8] The Commission did not directly address Norwood's argument that the formula was unreasonable in failing to provide a credit for plant divestitures.

On the interest rate issue, the Commission in its initial decision rejected the ALJ's ruling in NEPCO's favor, instead siding with Norwood. *Nat'l Grid III*, 2005 WL 1707455, 112 F.E.R.C. at 61,637-38. On rehearing, it reversed itself and sided with NEPCO.[9] FERC also reaffirmed its holding in favor of NEPCO on the R and M values. *Nat'l Grid IV*, 2006 WL 408272, 114 F.E.R.C. at 61,633-34. The Commission thereafter denied Norwood's request for further rehearing on the interest rate issue. *Nat'l Grid V*, 2006 WL 1794471, 115 F.E.R.C. at 62,552. This appeal followed.

We begin by considering Norwood's arguments concerning the R and M values. To the extent that Norwood purports to interpret the *language* of the CTC tariff amendment as requiring credit for divestiture of assets and true-ups, its

---

amount of a 28 percent of R-should be made to "reflect divestiture sales that were known and measurable" at the time the CTC was calculated. *Town of Norwood v. Nat'l Grid USA*, 2004 WL 1260993, 107 F.E.R.C. 63,041, at 65,191 (2004) ("*Nat'l Grid II*").

[8] *Town of Norwood v. Nat'l Grid USA*, 112 F.E.R.C. 61,099, at 61,629 (2005) ("*Nat'l Grid III*"), *modified on reh'g*, 2006 WL 408272, 114 F.E.R.C. 61,187 (2006) ("*Nat'l Grid IV*"), *further reh'g denied*, 2006 WL 1794471, 115 F.E.R.C. 61,396 (2006) ("*Nat'l Grid V*").

[9] The Commission said that it had misread the tariff in its initial decision, and that the tariff incorporated an 18 percent rate on overdue payments. *Nat'l Grid IV*, 114 F.E.R.C. at 61,636.

arguments are properly before us but fail on the merits. The CTC provides for certain kinds of credit adjustments to R, including for transmission services provided by third parties, but nowhere mentions credit for divestiture of assets. The CTC was clearly intended as a formula-not, as the staff urged, merely as "a starting point." *Nat'l Grid II*, 2004 WL 1260993, 107 F.E.R.C. at 65,191.

Norwood says that such a credit was implicitly intended because the CTC was modeled on the contract termination charge-formula approved in Order No. 888 and offered to settling customers, which provided credit for asset divestiture. But when FERC approved the CTC tariff amendment, it expressly noted that "[t]he proposed formula . . . differs from that applicable to other wholesale power customers." *New Eng. Power IX*, 1998 WL 246647, 83 F.E.R.C. at 61,723 nn. 5, 13.

Nor does the CTC anywhere indicate that the M values will be trued-up; quite to the contrary, the letter accompanying the tariff states that, although NEPCO planned to periodically update the estimates of market value provided in the tariff, "[a]ny updated estimates . . . would not affect the contract termination charges payable by a customer that exercised the early termination charge prior to the filing of the update."[10] In short, the CTC tariff language is clear and adverse to Norwood.

---

[10] Norwood also appears to argue that FERC erred in accepting NEPCO's market estimates, which, Norwood asserts, were too low. But we defer to the Commission and ALJ's reasoned explanation as to why NEPCO's market estimates were just and reasonable: the market prices in NEPCO's forecast were close to-and indeed slightly *higher* than-the prices in Norwood's contract with its new power supplier, the prices Norwood was offered by another power supplier, and the prices in Norwood's offer to continue buying power from NEPCO. *Nat'l Grid III*, 112 F.E.R.C. at 61,633; *Nat'l Grid II*, 107 F.E.R.C. at 65,187-91.

However, the main thrust of Norwood's position on appeal is that the CTC formula, as FERC reads it, is unlawful under the statute. Norwood argues that, because the formula fails to account for the divestiture of assets or to incorporate trued-up market values for power, it is not cost-based-that is, the CTC would give NEPCO more than it needs to recover any losses incurred by not supplying power to Norwood after preparing to do so; and that the CTC is therefore "unjust [and] unreasonable." 16 U.S.C. § 824e.

As we have noted, the Commission did not address these unreasonableness claims on the merits. Its position is that Norwood cannot now raise them because the reasonableness of the CTC *formula*-as opposed to its application-is res judicata. Although the Commission would likely prevail on the merits, this would likely require a remand and further proceedings. We agree that they need not be reached because Norwood's attacks on the reasonableness of the formula are foreclosed.

Over seven years ago, the Commission pronounced the CTC formula to be "reasonable" despite the fact that it failed to provide for any adjustments for asset divestiture or true-ups. *New Eng. Power IX*, 1998 WL 246647, 83 F.E.R.C. at 61,723 & nn. 5, 13. Norwood sought review of the FERC decision in *Norwood I*; but on appeal Norwood developed only its discrimination claim and a different unreasonableness argument but *not* the unreasonableness arguments concerning R and M that it now makes.

To permit Norwood now to advance new (and previously available) theories in opposition to an already-litigated tariff amendment would frustrate the values of repose and efficiency that res judicata doctrine is meant to protect. *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 798, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986). Res judicata does not merely prevent re-litigation of issues actually decided but also the presentation of new grounds that could and should have been raised when

the same transaction was the subject of earlier, different attacks. *Restatement (Second) of Judgments* § 24 (1982).

Generally speaking, such res judicata doctrine applies to agencies when they are acting in an adjudicative capacity to resolve a controversy between two parties. *Aunyx Corp. v. Canon U.S.A., Inc.*, 978 F.2d 3, 7 (1st Cir.1992), *cert. denied*, 507 U.S. 973, 113 S.Ct. 1416, 122 L.Ed.2d 786 (1993). Here and in the prior proceeding in which Norwood sought rejection of the CTC tariff, the parties are the same and, so far as Norwood contests the validity of the CTC formula, the subject matter is the same. The first proceeding resolved the reasonableness issue in what was effectively a final judgment; attacks not properly developed there cannot now be resurrected.[11]

Norwood says that when we sustained FERC in *Norwood I*, we expressly left open to Norwood a section 206 challenge to "the substance of the contract termination charge," adding that "[i]f these charges were miscomputed or unsupported, Norwood might well have a legitimate objection." 202 F.3d at 401. When setting for hearing the claim currently on appeal, FERC agreed that it had "not [yet] approved the individual components used in NEPCO's calculation" of the CTC. *Nat'l Grid I*, 2003 WL 21512482, 104 F.E.R.C. at 61,074.

But what was left open by these statements was the proper computation of the R and M values *according to the formula*—not new attacks on the formula itself. Norwood,

---

[11] For these reasons, we also reject Norwood's arguments concerning the CTC cap. Norwood claims that it cannot be required to "contribut[e] to . . . fixed power supply costs" for facilities that NEPCO has since profitably divested. But the CTC cap, like the CTC generally, is a formula incorporating values determined at the time of termination: it is equal to R minus NEPCO's average fuel costs with respect to Norwood. Norwood does not contest on appeal the calculation of NEPCO's average fuel costs; it does contest R, but this challenge is dealt with above.

quoting the FERC staff, says that the prior reservation could not have meant only to "giv[e] Norwood a chance to challenge NEPCO's arithmetic." But whether the figures proffered by NEPCO complied with the formula mattered a good deal and Norwood itself did urge that NEPCO had employed unreasonable estimates of the market value of the released load and had miscalculated its fixed power supply costs in determining the CTC cap.

Norwood says that rate orders are not subject to the rules of res judicata: a rate that was once reasonable may, in light of changed circumstances, become unreasonable. *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1290 (D.C.Cir. 2000). But the CTC is not a *rate;* it is "a formula driven charge . . . calculated based on rates already approved by FERC," *Norwood I*, 202 F.3d at 401, payment of which permitted Norwood to opt out of a contract before it had run its course. The charge became a fixed and final contractual obligation at the time of termination.

Norwood counters that the CTC, if not itself a rate, incorporated rates that should be open to challenge as unreasonably high. But there is nothing in the statute or case law cited by Norwood that prevents the construction of termination charge based on rates in effect as of a certain date. Creating a fixed and knowable obligation had advantages and disadvantages for Norwood in choosing whether to terminate; but the terms of the CTC were clear when it made its decision.

In effect, NEPCO bore the risk of higher costs and lower market prices than the CTC incorporated, and Norwood bore the risk of lower costs and higher market prices. Norwood was free to argue, in its original CTC challenge, that the tariff rates to be incorporated by the CTC were unreasonably high in light of what was known then about NEPCO's costs; but Norwood chose not to do so. Norwood was also free to terminate and contest the CTC terms as unlawful-which it

did, albeit unsuccessfully. What it could not do was to defer some of the available attacks on the CTC formula and now raise them in court for the first time eight years later.

Indeed, if we were to permit this kind of hide and seek litigation tactic, nothing would prevent Norwood from filing tomorrow a *new* section 206 attack to present *new* arguments as to why the original CTC formula was unlawful. Norwood has managed to defer making the full installment payments for years. It is now faced with large past-due obligations; but the obligations are ones easily foreseen, have been enlarged by delays in payment and are the product of Norwood's own choices.

Norwood would not likely have prevailed even if the merits were open. The reasonableness of NEPCO's approach in excluding true-ups and future plant divestitures is a regulatory issue within the province of FERC and reviewed by a court only for arbitrariness. *Cent. Maine Power Co. v. FERC*, 252 F.3d 34, 40 n. 3 (1st Cir.2001). There is nothing obviously unreasonable about framing a charge for contract termination that approximates, as of the time of termination, projected revenues promised by the buyer less projected avoided loss for the seller.

This brings us to the important issue of the interest rate. In December 1998, after FERC's 1998 order approving the CTC, NEPCO brought a breach of contract action against Norwood in Massachusetts state court, seeking to collect then-overdue CTC payments and late payment charges. In March 2001, the Massachusetts trial court granted NEPCO's summary judgment motion and awarded it $27,149,054.08, equal to the CTC and late payment charges due through January 31, 2001.[12]

---

[12] *New Eng. Power Co. v. Town of Norwood*, No. 982650A, 2001 WL 543172 (Mass.Super.Ct. Mar. 14, 2001), *aff'd*, 797 N.E.2d 26, at *2 (Mass.App.Ct.2003) (unpublished), *review denied*, 440 Mass. 1108, 799

In October 2003, the Appeals Court affirmed, noting specifically that "[w]e have . . . considered Norwood's arguments with respect to . . . the inclusion of an improper interest rate in the calculation and conclude that they lack merit." *New Eng. Power*, 797 N.E.2d 26, at *2. But it thereafter remanded, directing the trial court to conform to the FERC order that is the subject of this appeal, "or to any further modifications of that order by FERC." *New Eng. Power*, 847 N.E.2d 366, at *2. So the matter turns on FERC's ultimate determination.

We turn, therefore, to Norwood's claims regarding the interest rate for late payment of the CTC installments, which are two: one is that FERC misconstrued the tariff and that it is entitled under the tariff to pay a lower interest rate than the 18 percent ordered by FERC; the other is that the 18 percent rate is unlawful or at least inconsistent with prior Commission precedent. We treat the two issues in that order.

NEPCO has in its successive unpaid bills to Norwood applied an 18 percent interest rate to Norwood's *overdue* CTC payments, citing Section J of Tariff No. 1's schedule of general terms and conditions:

> When all or part of any bill shall remain unpaid for more than thirty (30) days after the rendering thereof by the Company, interest at the rate of 1% per month shall accrue to the Company from and after the rendering of said bill. . . .

Norwood first argues that the Section J rate is inapplicable to late CTC payments. Instead, it claims that section N applies; Section N was added to the tariff as part of the

---

N.E.2d 594 (2003), *cert. denied*, 541 U.S. 1073, 124 S.Ct. 2421, 158 L.Ed.2d 982 (2004), *amended*, 847 N.E.2d 366 (Mass.App.Ct.2006) (unpublished).

amendment permitting early termination of contracts under the formula we have been discussing. It states:

> The Contract Termination Charge shall be payable in equal monthly installments of principal and interest . . . The Customer's payments shall include carrying charges on the unpaid amount of the Contract Termination Charge at the interest rate determined pursuant to section 35.19a of the Commission's regulations (18 C.F.R. 35.19a) effective on the Early Termination Date and compounded monthly.

Although the termination charge was to be calculated at the time of termination, section N permitted its payment in installments over the remaining life of the contract and imposed, as "the carrying charge" (that is, interest) on the deferred payments, an interest rate specified in FERC regulations.[13] 18 C.F.R. § 35.19a. The cited regulations provided that, for refunds by carriers to customers where new rates had gone into effect but were later disallowed, the Federal Reserve prime interest rate applied.

The prime rate varies over time, but it has in recent years been considerably less than 18 percent. Norwood claimed in the Commission proceeding that the prime rate (varying over time), rather than the 18 percent rate, should be applied to its unpaid CTC bills. The Commission, after initially agreeing, ultimately held that the prime rate regulation did not apply and that the 18 percent rate in section J did. *See* note 9, *above.*

We think the question is close. The phrase "unpaid amount" in Section N could be read to include both *unbilled*

---

[13] NEPCO further explains that the monthly installments are calculated by (a) calculating the present discounted value of the total CTC amount using the section 35.19a rate and then (b) converting that lump sum into monthly installment payments that incorporate a carrying charge equal to the section 35.19a rate.

CTC amounts *and* amounts *billed but as yet unpaid* (*e.g.*, overdue payments). But the Commission is entitled to deference in interpreting tariffs filed with it, *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C.Cir.1998); the CTC is part of the tariff; and FERC's construction is reasonable, even though not inevitable, as we now explain.

Section N can easily be read to apply the prime rate only in calculating the installment amount due each month from the buyer who terminated, remaining silent as to the interest rate charged to *overdue* monthly installment payments. The fact that the carrying cost language is juxtaposed with the option to pay in installments supports this reading. And, if Section J is read as a catchall provision directed to all late payments, there would be no reason to address that subject in section N.

By contrast, Section J-which imposes an 18 percent interest rate on late payments-applies to "any bill"; and Norwood's monthly installment obligation is the subject of a "bill." Norwood argues that Section J applies only to bills for electricity sales, pointing to the fact that Section J defines a "month" as "the period between two meter readings. . . ." But the fact that the provision applies to metered sales does not exclude its application to other bills as well.

Norwood suggests that it is inconsistent to use two different interest rates, but interest rates reflect policy choices and the overdue payment context is not the same as the installment payment context. In particular, the prime rate can be viewed as a surrogate for the carrier's cost of money (although only very approximately); an 18 percent rate on overdue bills is, in recent years, considerably more than the carrier's cost of money and justifiable primarily to offset collection costs and encourage prompt payment.

This takes us directly to Norwood's alternative argument, namely, that if the tariff does impose an 18 percent rate on overdue CTC payments, it is unreasonable because such a

rate is in excess of NEPCO's cost of money. Taken in the abstract, this would be unpersuasive: deterring delayed payments is a legitimate purpose, quite apart from collection costs, and nothing in the statute prevents the Commission from treating a penalty as reasonable. If the Commission had said this and had no inconsistent precedent, that would be the end of the matter.

But Norwood's case is somewhat stronger because in *Connecticut Light & Power Co.*, 59 F.P.C. 811 (1977), FERC itself rejected a proposed 18 percent annual charge on late payments as "not supported by cost data." *Id.* at 821. The decision said that a late payment penalty might be warranted in cases of chronic delinquency, but in general "we do not believe as a matter of policy that this Commission should assume the functions of a bill collection enforcement agency except in otherwise hopeless situations." *Id.See also Pub. Serv. Co. of N.M. v. FERC*, 832 F.2d 1201 (10th Cir.1987).

In its order, the Commission distinguished *Connecticut Light & Power* on the ground that it involved a *proposed* penalty interest rate, so that the power company bore the burden of showing it to be reasonable; here, by contrast, the 18 percent rate had been part of the tariff since the mid-1970s, so Norwood bore the burden of showing it to be unreasonable. And, says the Commission, Norwood never offered cost evidence or other facts to show that the provision was unreasonable. *Nat'l Grid V*, 2006 WL 1794471, 115 F.E.R.C. at 62,551-52.

We do not find this a persuasive explanation. NEPCO does not seriously suggest that 18 percent represents its cost of money. So the real question is whether the Commission has altered its *Connecticut Light & Power* policy-which it could do with an explanation, *Atchison, Topeka & Sante Fe R.R. v. Witchita Bd. of Trade*, 412 U.S. 800, 808, 93 S.Ct. 2367, 37 L.Ed.2d 350 (1973)-or thinks that there is something about Norwood's situation that justifies such a penalty even

though prior precedent would not allow it for an ordinary overdue bill, absent special circumstances.

Frankly, the Commission-with some reason-appears merely to have run out of patience with Norwood's attempts to re-litigate issues that it earlier lost or forfeit. In fact, even the interest rate issue was raised belatedly; but the state court judgment no longer poses a res judicata objection and the Commission itself chose to address the objection on the merits. Having chosen to decide the issue, the Commission must face it squarely and adequately resolve it.

On remand the Commission is not limited to a single choice. Conceivably it could sustain the 18 percent figure against attack and modify its *Connecticut Light and Power* policy (or adequately distinguish it). Or it might find the 18 percent figure unreasonable and find the prime rate or some other rate above the prime rate to be appropriate. We do agree that this remains a section 206 proceeding in which Norwood is attacking a longstanding tariff provision and bears the ultimate burden of proof.

We address one other loose end as to interest. Norwood has also argued that even if the 18 percent rate is applicable to CTC late payments, the rate should not be applied to payments due prior to FERC's order of February 22, 2006, since before that point the CTC amount had not been determined. It is true that the CTC amount had been in dispute and in that sense had not yet been finally determined by the Commission.

But section J makes it quite clear that, when a customer disputes an amount billed by a carrier, the carrier is entitled to prescribed interest that accrues "from . . . the rendering of said bill" on "the amount finally determined to be due and payable." Norwood has challenged the amount of interest prescribed; but whatever the figure FERC finds justified, the tariff provides that Norwood owes that amount from the time the bill was rendered.

We *affirm* the Commission's order insofar as it determines the amount of principal due; as to the interest, we also affirm the order insofar as it requires interest payments based on at least the prime rate-the figure Norwood itself seeks-and remand only as to whether more is properly due. Our stay order of August 21, 2006, will terminate when the mandate issues. Each party will bear its own costs in this court.

Affirmed in part and remanded in part.

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION
112 FERC ¶ 61,099

Docket No. EL03-37-001

Before Commissioners: Joseph T. Kelliher, Chairman; Nora Mead Brownell, and Suedeen G. Kelly.

TOWN OF NORWOOD, MASSACHUSETTS,

v.

NATIONAL GRID USA, NEW ENGLAND ELECTRIC SYSTEM,

MASSACHUSETTS ELECTRIC COMPANY, and
NARRAGANSETT ELECTRIC LIGHT COMPANY.

ORDER ON INITIAL DECISION

(Issued July 22, 2005)

I. Introduction

1. This complaint involves the calculation of compensation due New England Power Company (New England Power)[1] from the Town of Norwood, Massachusetts (Norwood) following Norwood's termination of a full requirements electric service contract before the end of the contract term so that it could purchase power from another supplier.

---

[1] New England Power has been renamed National Grid USA Service Company, Inc. (National Grid) following the merger of its corporate parent. However, throughout this order, the company is referred to as New England Power.

2. The Commission previously had accepted New England Power's Contract Termination Charge (CTC) to apply to customers who choose to terminate early.[2] Subsequently, Norwood filed this complaint, contending that the CTC is unjust, unreasonable, unduly discriminatory, and preferential under the Federal Power Act (FPA).[3] The Commission set only five of Norwood's challenges for hearing, noting that it already had accepted the CTC formula, but had not accepted the individual components in New England Power's calculation.[4]

3. This proceeding is now before the Commission on exceptions to an Initial Decision (ID) issued by the Presiding Administrative Law Judge (Judge).[5] Norwood, Respondents,[6] and the Commission's Trial Staff (Staff) filed briefs on and opposing exceptions to the ID. As discussed below, the Commission affirms the ID in part and modifies it in part.

II. Background

4. The lengthy background of this proceeding is thoroughly recounted in the ID[7] and will be related only briefly here.

---

[2] *England Power Co.*, 83 FERC ¶ 61,174, *reh'g denied*, 84 FERC ¶ 61,175 (1998). In its transmittal letter, New England Power stated that the proposed amendment would allow only one customer, Norwood, to terminate the contract early. New England Power Company, FERC Electric Tariff, Original Volume No. 1, Amendment to Tariff, Transmittal Letter at 3 (March 18, 1998).

[3] 16 U.S.C. 791a *et seq.* (2000).

[4] *Town of Norwood, Massachusetts v. National Grid USA*, 104 FERC ¶ 61,030 at P 18 (2003) (Hearing Order).

[5] *Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 (2004).

[6] Respondents include National Grid, New England Electric System, New England Power, Massachusetts Electric Company (Mass Electric), and Narragansett Electric Light Company (Narragansett).

[7] *Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at P 1-14 (2004).

5. Historically, New England Power provided wholesale electric requirements service under its Tariff No. 1 to its retail distribution affiliates, Mass Electric and Narragansett. In 1983, it began full requirements service to Norwood. Norwood purchased transmission services separately from Boston Edison Company (Boston Edison).

6. In 1989, New England Power and Norwood amended their contract to permit Norwood to elect to extend the earliest date for notice of termination. Norwood exercised the election and extended the date for notice of termination, which extended the term of the contract for 10 years, through October 2008.

7. However, on March 4, 1998, Norwood notified New England Power that it would terminate its service as of April 1, 1998, and would begin taking service from Northeast Utilities Service Company (Northeast Utilities). As stated above, the Commission subsequently accepted an amendment to New England Power's tariff that would permit customers to terminate their contracts on 30 days' notice, but would require such customers to pay a CTC; New England Power acknowledged that the CTC applied only to Norwood.[8] In its CTC filing, New England Power also stated that the CTC formula applies the lost revenues approach used in Order No.

---

[8] In its order accepting the CTC, the Commission observed that New England Power proposed to allow a customer to terminate service early, subject to the payment of a CTC, which was based on the revenues lost approach approved by the Commission in Order No. 888 for calculating stranded costs. However, the Commission pointed out that the CTC was not designed to recover extra-contractual costs and, therefore, was not a mechanism for recovering stranded costs, as defined in Order No. 888. The Commission further stated that New England Power's proposed CTC was designed to compensate New England Power for the revenues it otherwise would be entitled to collect in the absence of the customer's early termination of its service agreement. New *England Power Co.*, 83 FERC ¶ 61,174, at 61,721-22 (1998).

888 for the calculation of stranded costs,[9] although New England Power emphasized that it did not seek to charge for stranded costs attributable to any period beyond the earliest date upon which either New England Power or the customer could terminate the contract. Instead, explained New England Power, the CTC generally would compensate it for the revenues it would have collected under the contract if the customer had not terminated early.[10]

8. Norwood did not pay the CTC and started a series of challenges, which are described in the ID. In setting the instant complaint for settlement judge and hearing procedes,[11] the Commission dismissed a number of the issues raised by the complaint and set for hearing only five of Norwood's claims, stating that it had not previously approved the individual components used in New England Power's calculation of the CTC. Additionally, the Commission affirmed its previous findings that (a) when a customer prematurely terminates a contract, imposition of a CTC is reasonable, (b) rules relating to stranded cost recovery are not

---

[9] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities: Recovery of Stranded Costs by Public Utilities and Transmitting Utilities,* Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. [Regulations Preambles, January 1991-June 1996] ¶ 31,036 (1996), *order on reh'g,* Order No. 888-A, 62 Fed. Reg. 12,274 (March 4, 1997), FERC Stats. & Regs. [Regulations Preambles, July 1996-December 2001] ¶ 31,048 (1997), *order on reh'g,* Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g,* Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC,* 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC,* 122 S.Ct. 1012 (2002).

[10] New England Power Company FERC Electric Tariff, Original Volume No. 1, Amendment to Tariff, Docket No. ER98-2233-000, Transmittal Letter at 2 (March 18, 1998).

[11] Settlement judge proceedings proved fruitless, so the Judge conducted the hearing.

applicable to a charge for premature termination of a contract, and (c) rules allowing customers to market released capacity do not apply when the customer prematurely terminates the contract.[12] Norwood, as the complainant in this proceeding, bore the burden of proof with respect to the issues set for hearing. Except as discussed below, Norwood failed to carry the burden of proving that the adjustments to the CTC formula that it advocated are consistent with the tariff.

III. Discussion

9. In this order, the Commission addresses whether the Judge's calculation of the CTC is in accord with the previously-accepted CTC formula applicable to Norwood. Except as discussed below, the Commission affirms the Judge's determinations.[13] The Commission does not address again in this order the merits of the accepted CTC formula, which sets a specific tariff-based price for early termination of the service agreement. The CTC formula is structured to permit New England Power to recover the revenues it would have collected had the customer continued to pay the fixed tariff rate through the contract term.

---

[12] *Town of* Norwood, *Massachusetts v. National Grid USA*, 104 FERC ¶ 61,030 at P 18, 21 (2003).

[13] Norwood states that it will accept the Judge's determinations, and further, that in an effort to conclude the litigation, it sent a check to New England Power on July 22, 2004, in the amount of $20,356,994.35. Norwood contends that this is the principal amount of $11,366,175.00, as calculated under the ID for the period from April 1, 1998, through June 30, 2004, plus $2,349,623.35 in interest (at the rate prescribed in New England Power's CTC filing) from April 1, 1998, through June 30, 2004, plus $6,641,146.00 which is the present value of future charges from July 1, 2004, through October 31, 2008. Although it states that New England Power accepted the check, Norwood emphasizes that New England Power has not agreed to settle this proceeding. Reply Brief of Complainant Town of Norwood, Massachusetts to Respondent's Brief on Exceptions at 3 n.2 (July 29, 2004).

A. Summary of the CTC[14]

10. Norwood's CTC is determined by applying the following formula: CTC = (R-M) x L, where "R" is New England Power's annual revenues from Norwood, "M" is the estimated market value of Norwood's released capacity, and "L" is the remaining length of the contract obligation, in this case, from April 1, 1998, through October 2008 in accordance with Norwood's decision to terminate its service from New England Power.

11. As discussed in greater detail below, the "R" factor reflects the revenues that New England Power was receiving from Norwood at the time of the termination under Commission-approved rates. Such revenues reflect a credit for the transmission services that Norwood purchased from Boston Edison. New England Power determined the revenues based on the revenue it received from Norwood during the 12 months immediately prior to the early termination date.

12. The "M" factor used by New England Power is the market value of the power it was supplying Norwood at the time of the early termination. The CTC formula includes a table of kilowatt hour (kWh) prices to be used in this calculation for the years 1998 through 2007 and provides that prices for 2008 and thereafter will be the prices for 2007 escalated at two percent annually. The released load factor used by New England Power is the annual average of kWh that Norwood purchased from New England Power during the 12 months prior to the early termination.

---

[14] *Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at P 15-23 (2004). *See also* New England Power Company, FERC Electric Tariff, Original Volume No. 1, Amendment to Tariff, Docket No. ER98-2233-000 (March 18, 1998).

B. Revenue Factor

1. The ID[15]

13. The revenue factor represents the revenues New England Power was receiving from Norwood under Commission-approved rates at the time Norwood terminated the contract, less a credit for transmission payments to Norwood's transmission provider, Boston Edison. At the hearing, New England Power claimed that its total revenue calculation was consistent with its tariff and Order No. 888.[16]

14. In contrast, Norwood argued that the total revenue component was too high because it failed to reflect a 28 percent reduction in revenues attributable to the divestiture of New England Power's non-nuclear assets; in other words, it would permit New England Power to recover costs attributable to facilities it no longer owned.[17] Staff agreed that the total revenue component should be adjusted to reflect asset divestitures that were known and measurable at the time the CTC was filed, but Staff also argued that the reduction in

---

[15] *Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at P 55-71 (2004).

[16] New England Power relied on *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. [Regulations Preambles, January 1991-June 1996] ¶ 31,036 at 31,841 (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (March 4, 1997), FERC Stats. & Regs. [Regulations Preambles, July 1996-December 2001] ¶ 31,048 at 30,427 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 122 S.Ct. 1012 (2002).

[17] Norwood cited Ex. NOR-11 at 2-3; *New England Power Co.*, 82 FERC ¶ 61,179 (1998).

revenues should reflect the divestiture of nuclear as well as non-nuclear facilities.[18]

15. Citing Commission and judicial precedent, the Judge concluded that Order No. 888 and its progeny are not controlling precedent in this case;[19] rather, she found that the task here is to determine the just and reasonable compensation for New England Power for the consequences of Norwood's early termination of the contract. While the Judge emphasized that Order No. 888 rules related to stranded cost recovery do not apply to a charge for the premature termination of a contact,[20] she found that the use of "present revenues" here is supported by the same goals that the Commission cited in Order No. 888.[21] In light of Norwood's failure to file an FPA

---

[18] Staff cited Ex. S-7 at 2-3 (1997 Annual Report of New England Electric System (NEES) filed in March 1998 with the Securities and Exchange Commission, in which NEES stated: "We are delighted to report that the purchase price will effectively recover our investments not only in our fossil and hydro plants, but in nuclear plants as well.").

[19] The Judge cited *Town of Norwood, Massachusetts v. National Grid USA*, 104 FERC ¶ 61,030 at P 21 (2004); *Town of Norwood, Massachusetts v. FERC*, 202 F.3d 392, 398-99 (1st Cir. 2000).

[20] The Judge cited *Town of Norwood, Massachusetts v. National Grid USA*, 104 FERC 61,030 at P 21 (2003), *citing New England Power Co.*, 83 FERC ¶ 61,174 at 61,273, *reh'g denied*, 84 FERC ¶ 61,175 (1998); *Town of Norwood, Massachusetts v. FERC*, 202 F.3d 392, 398-99 (D.C. Cir. 2000).

[21] The Judge stated that the Commission announced in Order No. 888 the need to provide certainty to customers contemplating a change in suppliers and to avoid disputes over whether the rates were excessive or inadequate. The Judge cited *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. [Regulations Preambles, January 1991-June 1996] ¶ 31,036 at 31,841 (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (March 4, 1997), FERC Stats. & Regs. [Regulations Preambles, July 1996-December 2001] ¶ 31,048 at 30,427 (1997).

section 206 complaint to decrease its rates prior to termination, the Judge found that it was reasonable to use the last 12 months of New England Power's Commission-approved rates to calculate the actual revenues that New England Power received from Norwood.

16. The Judge also adopted the 28 percent adjustment to reflect the divestiture of non-nuclear assets that was known and measurable at the time New England Power filed the Norwood CTC. The Judge pointed out that Respondents filed an application with the Commission on October 1, 1997, seeking approval for the divestiture of their generating business,[22] and New England Power indicated that the proceeds of the divestiture would be credited to New England Power's wholesale customers to reduce stranded costs.[23] The Judge also found that New England Power's corporate parent cited the divestiture in its 1997 Annual Report to the Securities and Exchange Commission[24] and that New England Power already was making plans for the divestiture, including signing the contract for the sale of the assets. In addition, the Judge cited the 28 percent reduction given to New England Power's affiliated customers.[25] For all of these reasons, the Judge concluded that divestiture of these non-nuclear assets was known and measurable at the time New England Power filed the Norwood CTC amendment.[26] With respect to the divestiture of the nuclear assets, the Judge noted that the 1997 annual report of New England Power's corporate parent showed that New England Power was planning to divest those assets as

---

[22] Docket Nos. EC98-1-000 and ER98-6-000.

[23] The Judge stated that Norwood relied on Ex. NOR-12 at 2. The Commission approved the divestiture and the CTCs for the affiliates. New *England Power Co.*, 82 FERC ¶ 61,179 (1998).

[24] The Judge cited Ex. S-7 at 2-3.

[25] The Judge cited Ex. NOR-11 at 2-3.

[26] The Judge cited Ex. S-7 at 2-3.

well, but the Judge did not include the sales in the calculation of "R" because she found that the transactions occurred piecemeal between 2000 and 2002.[27]

17. The Judge recognized that Norwood and New England Power's settling affiliates are not similarly situated, but despite that, she determined that similar treatment with respect to the effect of the divestiture proceeds is necessary. While she acknowledged that this adjustment would not result in completely equal treatment for Norwood and the settling customers, the Judge found that such differences are not unduly discriminatory under the facts of this case. The Judge concluded that, without interest, the "R" factor is $141,314,711.

2. Positions of the Parties on Exceptions

18. Respondents challenge the Judge's conclusion that divestiture of the non-nuclear facilities was known and measurable at the time New England Power filed the Norwood CTC. Additionally, Respondents contend that adjusting the CTC to assure parity with settling customers is contrary to the Commission's policy of encouraging settlements.[28] Respondents distinguish the settling customers' CTCs in part because those customers must pay a share of New England Power's power supply-related costs indefinitely, while Norwood's CTC obligation is limited based on the remainder of the contract term.[29] Respondents further assert that the Judge's adjustment is contrary to the CTC formula, Order No. 888, and the

---

[27] The Judge cited Ex. S-7 at 2-3; Tr. 477-83.

[28] Respondents cite *Town of Norwood, Massachusetts v. FERC*, 202 F.3d 392, 402 (1st Cir. 2000); *New England Power Co.*, 83 FERC ¶ 61,174 at 61,722 (1998); *Town of Norwood, Massachusetts v. National Grid USA*, 104 FERC ¶ 61,030 at P 19 n.1 (2003); Ex. NEP-2 at 3; Ex. NEP-9; Ex. NEP-45; Ex. NOR-11 at 4; Ex. NOR-12 at 9-10; Tr. 467-70. *See also Edwards Mfg. Co., Inc.*, 83 FERC ¶ 61,269 at 62,123 (1998); *Delmarva Power & Light Co.*, 6 FERC ¶ 61,084 at 61,162 (1979).

[29] Respondents cite Ex. NEP-27 at 58-59.

Judge's own determination that the CTC is properly calculated on the basis of New England Power's actual revenues from Norwood at the time of the temination.[30] Respondents argue that the Norwood CTC does not permit this adjustment to the revenues.[31]

19. Respondents further contend that the Judge ignored testimony that the 28 percent reduction in the settlement CTCs was the result of reflecting a reduction in the charge for the wholesale Standard Offer service that was provided to the settling customers but not to Norwood, in addition to reflecting the non-nuclear asset sale proceeds in the settlement CTCs.[32] Respondents reason that the savings attributable to the Standard Offer service should not reduce Norwood's CTC because the Commission and the courts have found that Norwood was not entitled to Standard Offer service.[33]

20. Respondents next assert that the Judge's adjustment is contrary to the CTC formula, Order Nos. 888 and 888-A, and the Judge's own determination that the CTC is properly calculated on the basis of New England Power's actual revenues from Norwood at the time of the termination.[34] Respon-

---

[30] Respondents cite Ex. NEP-2, Schedule II-C at 2.

[31] Respondents cite New *England Power Co.*, 83 FERC ¶ 61,174 at 61,723 (1998); Ex. NEP-1 at 8.

[32] The rates that Norwood paid under the tariff prior to its contract termination were the same as the rates paid by New England Power's affiliates before the Boston Edison Transmission credit. The rate was 6.52 cents per kWh for the 12 months ending March 31, 1998. Thus, the 28 percent discount (1.82 cents per kWh) was determined by reducing the 6.52 cents by the 3.2 cents per kWh for the Standard Offer service and 1.5 cents per kWh for the affiliates' CTC (6.52 – 3.2 – 1.5 = 1.82).

[33] Respondents cite *Town of Norwood, Massachusetts v. National Grid USA*, 104 FERC ¶ 61,030 at P 19 (2003); *New England Power Co.*, 82 FERC ¶ 61,179 at 61,664 (1998); *Town of Norwood, Massachusetts v. FERC*, 202 F. 3d 392, 403 (1st Cir. 2000).

[34] Respondents cite Ex. NEP-2, Schedule II-C at 2.

dents assert that there is no provision for adjustment to those revenues,[35] consistent with the Stranded Cost Obligation formula adopted in Order No. 888.[36] Respondents further argue that Order Nos. 888 and 888-A do not provide for adjustments to a supplier's present revenues to reflect the impact of future events, whether or not known and measurable.

21. Respondents claim that the Commission recognized that the Norwood CTC formula was based on the lost revenues approach adopted in Order No. 888 and accepted it without objection to the formula's reliance on the present revenues from a terminating customer or on the absence of adjustments to account for the planned sale of the non-nuclear assets.[37] However, maintain Respondents, while the Judge determined that the same considerations that caused the Commission to rely on present revenues in the Order No. 888 Stranded Cost Obligation formula applied to the Norwood CTC, she disregarded her own ruling that it was reasonable to use New England Power's Commission-approved rates in making the calculation when she recommended that the actual revenues should be reduced in proportion to the reductions applicable to the settling affiliated customers.

22. Additionally, Respondents assert that the Commission's regulations provide that adjustments to an historic Period I test year are limited to "changes that affect revenues and costs prior to the proposed effective date of the rate schedule change and that are known and measurable with reasonable accuracy at the time the rate schedule change is filed."[38] While the proposed effective date of the CTC amend-

---

[35] Respondents cite Ex. NEP-1 at 8.

[36] Respondents cite Order No. 888 at 31,841.

[37] Respondents cite May 15, 1998 Order at 61,723.

[38] Respondents cite 18 C.F.R. §§ 35.13(d)(1)(ii), 35.13 (a)(2)(D) (2004). Section 35.13(a)(2)(A) defines the test period as "the most recent calendar

ment was March 31, 1998, Respondents emphasize that the divestiture transaction occurred several months later.

23. Respondents also cite Order No. 888-A, stating that the revenues lost approach used in the Norwood CTC already includes an offset for the value of generating assets that can fetch a market price higher than the book value of the assets;[39] therefore, there is no need for a divestiture credit. In this regard, Respondents assert that the Judge erred in finding that the Order No. 888-A stranded cost obligation provision does not apply to the Norwood CTC.

24. Norwood maintains that the affiliates were allowed to terminate their contracts and receive more favorable rates than the rate offered Norwood. Further, asserts Norwood, Respondents incorrectly relied on *Delmarva Power & Light Co. (Delmarva)*[40] in support of their assertion that the Judge's decision on this issue would subvert the public interest in promoting settlements.

25. Additionally, Norwood challenges Respondents' claim that the revenue adjustment does not comply with the "known and measurable" standard established in 18 C.F.R. § 35.13 (d)(1)(ii). Norwood submits that this regulation applies only if the utility is not required to file Period II data and only if the company adjusts all Period I data to reflect such changes.

---

year for which actual data are available, the last day of which is no more than fifteen months before the date of tender for filing. . . ."

[39] Respondents cite Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888-A, 62 Fed. Reg. 12,274 (March 4, 1997), FERC Sts. & Regs. [Regulations Preambles, July 1996-December 2001] ¶ 31,048 at 30,438-39 (1997).

[40] 6 FERC ¶ 61,084 (1979). In that case, the Commission stated that differences in rates between settling and non-settling customers may be justified if there are factual differences that justify the disparity. *Id.* at 61,161-62.

26. Norwood also maintains that the Judge did not give it an undue preference.[41] For example, states Norwood, the Judge did not require an adjustment for the sale of the nuclear facilities, although such an adjustment is included in the settling customers' CTCs. Norwood argues that New England Power made the commitment to divest the nuclear facilities well before it filed the Norwood CTC;[42] therefore, the revenue factor in its CTC should be adjusted to reflect the divestiture of those facilities as well as the non-nuclear facilities.

27. Norwood also argues that adjusting revenues to account for divestiture of assets is consistent with Order No. 888.[43] Norwood contends that Order No. 888 implemented a separate approach applicable to a situation involving divestiture of generating assets. Norwood also claims that the Commission denied stranded cost recovery where the departing customer does not use the former supplier's transmission system to reach a new supplier, as is true in this case.[44]

28. Norwood contends that the following evidence supports the 28 percent reduction in revenues:

1. Respondents agreed well before New England Power filed the Norwood CTC to divest all of their generation business (Ex. NOR-10 at 13-17);

2. Respondents sold all of their non-nuclear generation business pursuant to a contract dated August 5, 1997,

---

[41] Norwood cites Ex. NOR-30 at 3-7; Ex. NOR-35.

[42] Norwood cites Ex. NOR-10 at 13-17.

[43] Norwood cites *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Sts. & Regs. [Regulations Preambles, January 1991-June 1996] 31,036 at ¶ 31,788-89 (1996).

[44] *Id.* at 30,362. Respondents also cite *Town of Norwood, Massachusetts v. FERC*, 202 F.3d 392, 399 (1st Cir. 2000).

for $500 million over book value (Ex. NOR-12);

3. Respondents agreed to structure CTC charges for their affiliates, filed with the Commission on October 1, 1997, to reduce the affiliates' CTC charges to 1.5 cents per kWh based on the sale agreement and to provide for annual updates to reduce fixed costs based on the sale of nuclear units;

4. Respondents obtained approval from the Commission on February 25, 1998, for the divestiture and for the reduced CTCs for their affiliates, including annual updates to reduce fixed costs *(New England Power Co.,* 82 FERC ¶ 61,179 (1998));

5. Respondents filed annual reports for 1997 with the Commission and the Securities and Exchange Commission advising of the proceeds from the divestiture for all of their generation business, including their nuclear units (ID at P 67);

6. Respondents closed the divestiture transaction in September 1998 (Ex. NEP-27 at 55, 58);

7. Respondents closed the sale of the nuclear units in 2000-2002 (ID at P 67); and

8. As of November 11, 2003, Respondents adjusted the CTCs for their affiliates downward in annual based on remaining fixed power supply costs, to range from 1.407 cents per kWh in 1998 to 0.14 cents per kWh in 2008 (Ex. NOR-41, Schedule 1, page 1 of 16, column 12).

29. Staff supports the Judge's adjustment to the "R" component, claiming that it prevents New England Power from double-recovering its fixed costs.[45] Staff points out that the

[45] Staff states that even New England Power's witness agreed that this would be inappropriate. Staff cites *Town of Norwood, Massachusetts v.*

Commission previously decided that the stranded cost obligation provisions of Order No. 888 do not control in this case. Staff maintains that this case is merely to calculate the proper compensation due New England Power as a consequence of Norwood's termination of the contract. Staff also states that the Judge correctly determined that the proper reading of the "R" component description in the Norwood CTC requires use of the last 12 months of revenue data as a starting point from which adjustments, such as that for the divestiture, could be made.[46]

30. Staff asserts that the CTC formula contemplates further adjustments when the last 12 months of revenues are used in the calculation of "R". Staff agrees that the evidence cited by Norwood supports the Judge's determination that divestiture of the non-nuclear assets was known and measurable. Staff also emphasizes that the 28 percent figure is supported by the evidence and is not an attempt to ensure parity with the settling customers.

31. Staff further challenges Respondents' argument that the "R" factor already accounts for the divestiture proceeds under the Order No. 888 stranded cost formula. Staff emphasizes that the Order No. 888-A provision assumes that the assets continue to be owned by the utility claiming stranded costs. Further, maintains Staff, Order No. 888 specifically states that, when stranded assets are sold above their book value, the proceeds must be taken into account.[47] Staff reasons that, if this were done automatically, the Commission in Order No.

National Grid USA, 107 FERC ¶ 63,041 at P 65, 68, 70 (2004); Tr. 543; Ex. S-3 at 17.

[46] Staff states that this is true even though Norwood could have filed a complaint that might have resulted in a calculation of revenues even lower than that the results from adjusting the last 12 months of data to reflect the divestiture.

[47] Staff cites Ex. S-1 at 19.

888 would not have singled out divestiture sales as exceptional circumstances for determining stranded costs, rather than determining such costs through a formula.

3. Commission Analysis

32. The Commission modifies the ID with respect to calculation of the "R" factor. Although the Judge correctly adopted use of the actual revenues paid by Norwood during the 12 months prior to the contract termination as the starting point in determining the total revenue component in this case, the Commission finds that the 28 percent adjustment adopted by the Judge does not comply with the CTC formula previously accepted by the Commission. The tariff specifically provides for certain types of adjustments, including the credit for transmission services provided by third parties,[48] which is discussed elsewhere in this order, but does not provide for an adjustment such as the Judge proposed, which reflects the divestiture of certain facilities and a factor related to the rates for Standard Offer service, which Norwood has not received. Absent specific language providing for such an adjustment, the Commission will not include it in the calculation of Norwood's CTC. The tariff language is unambiguous.

33. Moreover, as the Commission has stated, Norwood is not similarly situated vis-a-vis the settling customers, so this difference between its CTC and those of the settling custom-

---

[48] FERC Electric Tariff No 1, Schedule II-C, Original Page No. 2, section 1.a. attached to New England Power's Amendment to Tariff (March 18, 1998) provides as follows:

> The calculation of Total Revenue shall include credits pursuant to Schedule III-D of this tariff as well as all credits and surcharges applicable to the Customer under the Customer's Service Agreement with the Company under this tariff, with the exception of credits associated with Integrated Facilities arrangements under Schedule III-B of this tariff and any credits associated with the Company's reimbursement of the Customer's payments to third parties for transmission service.

ers is not undue discrimination. The Commission emphasizes again that the purpose of this CTC is to compensate New England Power for the loss of revenues attributable to Norwood's early termination of the contract. There is no requirement that Norwood receive the benefits received by the customers that negotiated their departures from New England Power's system, an opportunity that Norwood declined.[49] The Commission will not address again the arguments that Norwood's CTC is governed by the stranded cost obligation provisions of Order No. 888. That issue has been resolved much earlier, as previously discussed in this order. Accordingly, the correct "R" factor is $196,270,432.

C. Rate of Return

1. The ID[50]

34. This issue deals with the rate of return that can be used in determining the "R" component of the CTC. At the hearing, New England Power argued that the CTC does not specify a rate of return and, further, that the issue already has been litigated. In contrast, Norwood claimed that the CTC's rate of return is excessive[51] and that a rollback of the demand charge by $1.94/kWh is required. Norwood contended that

---

[49] Respondents' reliance on *Delmarva Power & Light Co.*, 6 FERC ¶ 61,084 (1979), is misplaced. That order does not say that affording a non-settling customer the same adjustment provided to the settling customers would discourage settlements. Rather, the Commission ruled in that case that differences in rates between settling and non-settling customers may be justified if there are factual differences to justify the disparity. As the Commission has stated in this proceeding as well as in others,

[50] Town of Norwood, Massachusetts v. National Grid USA, 107 FERC ¶ 63,041 at P 72-79 (2004).

[51] Norwood cited Ex. NOR-18; Ex. NOR-17 at 10-11; Ex. NOR-25 at Workpaper No. 7.

this would reduce the level of gross revenue by $1,138,931, based on the 12-month period ended March 31, 1998.[52]

35. Norwood also disputed New England Power's contention that the issue is outside the scope of this case, emphasizing that the Commission made that determination when it set this issue for hearing[53] and that New England Power did not seek rehearing of the Hearing Order. Staff agreed that the Norwood CTC would yield an excessive rate of return for New England Power. However, Staff maintained that Norwood's rate of return calculations were too high as well. Staff claimed that Norwood's proposed rate of return did not reflect New England Power's ownership of generating assets, which were still at a nominal risk of non-recovery for a period of time after March 1998.[54]

36. The Judge ruled that this issue is within the scope of this case.[55] However, the she found that neither Norwood nor Staff justified the reductions they recommended.[56] Accordingly, the Judge stated that, because the actual revenues included in the calculation by New England Power were just, reasonable, and not unduly discriminatory once adjusted downward to account for the divestiture, the overall rate of return that New England Power would earn from the CTC need not be adjusted.

2. Commission Analysis

37. On exceptions, the parties raise no new arguments not addressed by the Judge. The Commission affirms the ID with

---

[52] Norwood cited Ex. NOR-30 at 6-7; Ex. NOR-31 at 3.

[53] Norwood cited Town of Norwood, Massachusetts v. National Grid USA, 104 FERC 61,030 at P 13, 18 (2003).

[54] Staff cited Tr. 254-255.

[55] The Judge cited *Town of Norwood, Massachusetts v. National Grid USA*, 104 FERC ¶ 61,030 at P18 – 21 (2003).

[56] The Judge cited Ex. NOR-17 at 14-15.

respect to the reasonableness of the rate of return used in the determination of the "R" component of the CTC. The record supports the Judge's ruling that Norwood and Staff failed to meet the FPA section 206 burden of proof to support their challenges to the rate of return. The rate of return applicable to the CTC formula is the same as the rate of return applicable to the rates charged Norwood during the 12 months preceding the contract termination. Neither Norwood nor Staff has shown that such rate of return was unjust or unreasonable or that its use in the CTC formula was improper. Therefore, regardless of whether the actual revenues are adjusted to reflect the divestiture, the Commission finds that the rate of return used by New England Power in its CTC calculations is just and reasonable.

D. Deduction for Transmission Revenues

1. The ID[57]

38. According to the tariff, the "R" component must be reduced by transmission revenues. At the hearing, New England Power claimed that Norwood improperly sought a transmission credit based on New England Power's transmission costs rather than the transmission credit in Norwood's service agreement.[58] However, the Judge found that because Norwood paid Boston Edison for transmission and received a credit from New England Power for that purchase, the amount Norwood paid Boston Edison for transmission services should be used as the transmission credit in determining the "R" factor.

2. Commission Analysis

39. The Commission summarily affirms the Judge's determination with respect to this issue. New England Power

---

[57] *Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at P 80-89 (2004).

[58] New England Power cited Tr. 278; Ex. NEP-51 at 6.

applied the proper factor in calculating the credit for transmission revenues in Norwood's CTC, and the parties have raised no new arguments on exceptions.

E. The Market Price Estimate of the "M" Factor

1. The ID[59]

40. The Judge acknowledged that New England Power properly determined Norwood's released load[60] for the remaining term of Norwood's contractual obligation to New England Power.[61] While the Judge pointed out that Norwood did not challenge at the hearing the reasonableness of the prices that were forecast,[62] she explained that Norwood and Staff argued that New England Power improperly relied on a market price forecast by an independent third party (the POLARIS forecast) instead of actual market values determined in the Northeast Power Pool (NEPOOL) market. Additionally, Norwood claimed at the hearing that New England Power failed to provide for updates to the estimates, as it had done in CTCs negotiated with other Tariff No. 1 customers, including affiliates of New England Power.[63]

---

[59] *Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at P 37-54 (2004).

[60] The Judge explained that New England Power corrected an initial error in calculating Norwood's Released Load. The Judge cited Ex. NEP-1 at 31; Ex. NEP-6.

[61] The Judge cited *Town of Norwood, Massachusetts*, 87 FERC 61,341 (1999), *reh'g denied*, 88 FERC 61,187 (1999), *aff'd*, 217 F.3d 24 (1st Cir. 2000), *cert. denied*, 532 U.S. 993 (2001).

[62] *Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at P 38 (2004).

[63] New England Power negotiated CTCs with other departing Tariff No. 1 customers, including its affiliates. Those CTCs contain certain provisions that are not part of the Norwood CTC, and many of Norwood's objections to its CTC center on these differences. However, as noted throughout this order, the Commission and the court have ruled that these differences are not undue discrimination because, given Norwood's uni-

Norwood further asserted at the hearing that it should be allowed to broker the electricity it is not purchasing as a means of minimizing its CTC obligation. At the hearing, New England Power countered that Norwood's challenges were beyond the scope of this proceeding and further, that Norwood's position was contrary to Order No. 888. New England Power maintained that Norwood had not demonstrated that the alternative forecasts it proposed rendered use of the POLARIS forecast unreasonable.

41. The Judge ruled that Norwood and Staff had not demonstrated that use of the POLARIS forecast in the CTC calculation rendered it unjust and unreasonable. The Judge found in part that the market prices in New England Power's forecast were very close to, but slightly higher than certain other prices that could also be deemed relevant to the projections, including: (1) the prices in Norwood's replacement contract with Northeast Utilities, (2) the prices in another contemporaneous power supply offer that Norwood received, and (3) the prices that Norwood offered New England Power for continued purchase of power. The Judge recommended that, if the Commission rejects use of the POLARIS forecast, Norwood's replacement contract with Northeast Utilities would provide the best alternative basis for the market price estimate, although she cautioned that use of the prices in the replacement contract would result in a higher CTC for Norwood.

---

lateral termination of its contract, it is not similarly situated with the customers that negotiated the terms of release from their contracts with New England Power. *See, e.g., Town of Norwood, Massachusetts v. FERC,* 202 F.3d 392-402-03 (1st Cir. 2000); *Town of Norwood, Massachusetts v. National Grid USA,* 104 FERC ¶ 61,030 P. 19 (2003); *New England Power Co.,* 84 FERC ¶ 61,175 at 61,920 (1998); New *England Power Co.,* 83 FERC ¶ 61,265 at 62,106-07 (1998).

2. Positions of the Parties on Exceptions

42. Norwood contends that the Judge erred by rejecting its arguments that the estimated market value (1) was far below actual market prices determined by the NEPOOL ISO from the inception of the NEPOOL Energy Exchange in May 1999 through February 2004, the period corresponding to the updates required by the CTCs applicable to New England Power's affiliates;[64] (2) conflicted with the stranded cost provisions of Order Nos. 888 and 888-A requiring an independent market analysis with supporting workpapers and prohibiting the use of a customer's contract rate without the customer's consent; and (3) conflicted with other market projections available prior to the date of the CTC filing. Moreover, argues Norwood, the Judge's ruling would allow Respondents to collect the value of the power twice—once from Norwood and again by selling the power in the NEPOOL market at actual market prices. Additionally, Norwood and Staff contend that New England Power improperly obtained the market value estimates (the POLARIS forecast) from the testimony of an employee of another company in a proceeding before the New Hampshire Public Service Commission rather than from a qualified witness in this case. Norwood also challenges the relevance of market value estimate numbers based on the Norwood/Northeast Utilities contract, claiming that this is contrary to Order No. 888's requirements.

43. Norwood points out that Respondents' generation divestiture agreements with its affiliates[65] required Respondents

---

[64] Norwood cites Ex. NOR-15 at 2-7; Ex. NOR-16; Ex. NOR-28; Ex. NOR-29.

[65] Norwood cites Ex. NOR-10, Article 6.0 at 13-18; Ex. NOR-12 at 1. In 1996 and 1997, New England Power made several filings to, *inter alia*, restructure its operations and sell its non-nuclear generating facilities. *See Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at P 4 (2004).

to mitigate their stranded cost charges and to credit shares of the net proceeds against the CTC obligations of Mass Electric and Narragansett.[66] However, continues Norwood, while respondents have made annual true-ups to the affiliates' CTCs, Respondents did not provide for comparable true-ups in the Norwood CTC.

44. Norwood next asserts that allowing a customer to broker the power it is no longer purchasing is the only way to protect against New England Power lowballing the market value estimate.[67] However, Norwood states that it does not have the option to broker that power because the Commission has ruled in this proceeding that "the rules relating to stranded cost recovery [under Order No. 888] do not apply to a charge for premature termination of a contract."[68] Despite that, Norwood argues that Order 888 requires different rules when, as here, a divestiture was authorized.

45. Norwood argues that, if the lost revenue approach is to be used, then Respondents should follow Order No. 888 and should treat Norwood as they do their affiliates and other municipal customers. Norwood maintains that by the time New England Power filed the Norwood CTC, it was no longer entering into any long-term bilateral contracts because of the impending sale of its generation units;[69] therefore,

---

[66] Norwood cites Ex. NOR-12 at 8.

[67] Norwood cites *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities,* Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Sts. & Regs. [Regulations Preambles, January 1991-June 1996]

[68] Norwood cites *Town of Norwood, Massachusetts v. National Grid USA,* 104 FERC ¶ 61,030 at P 21 (2003).

[69] Norwood cites Tr. 402-03.

reasons Norwood, New England Power should be required to provide true-ups for the CTC at issue here.[70]

46. In contrast, Respondents assert that the Judge correctly found that Norwood and Staff had not met their burden of proof in challenging the market value estimate because a forecast underlying a wholesale charge is valid if it was reasonable when made, not with the benefit of hindsight.[71] Respondents also emphasize that the Norwood CTC formula provides for the calculation to be based on the market price estimate in effect on the early termination date.[72] In this case,[73] explain Respondents, this was established in the CTC formula as a series of projected annual prices." Thus, continue Respondents, the rate on file relied on a fixed forecast of market prices, not on a series of true-ups based on post-termination market prices. Respondents contend that Norwood's CTC formula uses Order No. 888's formula for calculating a departing customer's stranded cost obligation under the lost revenues approach, which provides for a credit

---

[70] Norwood cites Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Sts. & Regs. [Regulations Preambles, January 1991-June 1996] ¶ 31,036 at 31,842 (1996) (emphasis in original). In its brief on exceptions, Norwood points out that the CTCs applicable to New England Power's affiliates contained "true-up" provisions, which require an annual reconciliation of those CTCs to be consistent with the actual costs of New England Power's remaining facilities. Brief on Exceptions of Complainant Town of Norwood, Massachusetts at 31-32 (July 9, 2004).

[71] Respondents cite *Northern Natural Gas Co.*, 27 FERC ¶ 61,031 at 61,057 (1984); *Jersey Central Power and Light Co.*, 60 FERC ¶ 63,012 at 65,140 (1992), *aff'd*, 77 FERC 61,001 (1996); *Indiana & Michigan Electric Co.*, 4 FERC ¶ 63,039 (1978), *aff'd in part and modified in part*, 10 FERC ¶ 61,238 (1980).

[72] Respondents cite Ex. NEP-2 at Orig. Page 3.

[73] *Id.* at Orig. Page 4.

based on an up-front estimate of the market value of a departing customer's released load, without true-up adjustments. Respondents emphasize that New England Power specifically stated when it filed the Norwood CTC that any updates would not affect the CTC.[74]

47. Respondents further emphasize that Norwood rejected a number of opportunities to pay settlement CTCs (calculated under the same formula used to calculate the CTCs of those customers who settled the terms of their departures).[75] Respondents point out that the Commission and the courts have ruled that differences between the CTCs payable by Norwood and those payable by other customers are not undue discrimination.[76]

48. Respondents next contend that Norwood improperly relies on the Order No. 888 principle that a utility may use replacement contract prices as market price estimates only if the customer agrees. They argue that New England Power did not base the market price estimate in Norwood's CTCs on the prices in Norwood's replacement contract with Northeast Utilities; in fact, they claim that New England Power did not

---

[74] Respondents cite Ex. NEP-2, Transmittal Letter at 2 n. 1. Respondents state that New England Power has found it did not need to update the CTC formula's market price estimate because none of its other wholesale requirements customers has indicated any intention to terminate service prematurely. Ex. NEP-1 at 12.

[75] Respondents cite *Town of Norwood, Massachusetts v. National Grid USA,* 104 FERC ¶ 61,030 at P 19 n.21 (2003); Ex. NEP-1 at 44; Ex. NOR-11 at 4; Ex. NEP-2 at 3; Ex. NEP-9.

[76] Respondents cite *Town of Norwood, Massachusetts v. FERC,* 202 F.3d 392, 402 (1st Cir. 2000); New England Power Co., 84 FERC ¶ 61,174 at 61,920 (1998), *citing Cities of Bethany v. FERC,* 727 F.2d 1131, 1139 (D.C. Cir), *cert. denied,* 469 U.S. 917 (1984); *Pacific Gas and Electric Co.,* 51 FERC 61,371 at 62,264, *order denying reh'g,* 52 FERC ¶ 61,318 (1990). *See also New England Power Co.,* 83 FERC ¶ 61,174 at 61,723 (1998); *Town of Norwood, Massachusetts v. National Grid USA,* 104 FERC ¶ 61,030 at P 19 (2003).

know the replacement contract prices when it filed the CTC formula. Respondents support the Judge's reliance on evidence of a contemporaneous price in a binding, long-term contract, pointing out that the Commission stated in Order No. 888 that the price a customer pays its alternative supplier is an accurate measure of the market value of the power not taken from the former supplier.[77]

49. Respondents also challenge Norwood's argument that New England Power failed to comply with Order No. 888 when it did not submit an independent market analysis with supporting workpapers. They emphasize that the Commission explicitly rejected this argument when it held that the requirements for stranded cost recovery under Order No. 888 do not apply to CTCs because the CTC "would recover costs that are solely attributable to a customer's existing Tariff No. 1 contract obligations."[78]

50. Staff opposes Norwood's exception in part, pointing to the Judge's statement that "the fact that the price forecast [New England Power] used in 1998 did not perfectly predict

---

[77] Respondents cite Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Sts. & Regs. [Regulations Preambles, January 1991-June 1996] ¶ 31,036 at 31,842 (1996). Respondents point out that the Commission ruled in the Hearing Order that Norwood was not entitled to the "market or broker" option and explicitly excluded that issue from this proceeding. *Town of Norwood, Massachusetts v. National Grid USA*, 104 FERC ¶ 61,030 at P 21 (2003). Moreover, argue Respondents, the relevance of the prices in Norwood's replacement contract to the reasonableness of the similar market price estimate is obvious and has nothing to do with whether or not Norwood was offered the right to market or broker power from New England Power.

[78] Respondents cite New *England Power Co.*, 83 FERC ¶ 61,174 at 61,723 (1998). *See also New England Power Co.*, 84 FERC ¶ 61,174 at 61,920 (1998).

subsequent energy prices does not satisfy Norwood's burden to prove that the Market Price Estimate in the CTC Formula is unjust and unreasonable."[79] In addition, even if actual prices were relevant, Staff argues that Norwood did not present the complete actual prices from April 1, 1998 for-ward, and indeed could not have, as there was no organized energy market in the region at the time.

3. Commission Analysis

51. The Commission affirms the ID with respect to this issue. The record supports the Judge's determination of the "M" factor in the Norwood CTC formula, which is explicitly defined in the tariff and has not been shown to be unjust or unreasonable. Additionally, the Commission and the courts previously have ruled on certain issues raised by Norwood.

52. Norwood's arguments fail for a number of reasons. First, because Norwood unilaterally terminated its contract and was not a party to the settlement with New England Power's other wholesale customers, it is not situated similarly to New England Power's settling customers.[80] The Commission affirmed this in the Hearing Order.[81] Because the Norwood CTC is not required to contain the same provisions as the CTCs for the settling customers, it is not unduly discriminatory for New England Power to refuse to afford Norwood periodic true-ups[82] or otherwise include in Norwood's CTC

---

[79] *Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at P 41 (2004).

[80] The Court of Appeals pointed out that New England Power offered to negotiate a similar termination agreement with Norwood, but its efforts were rebuffed. *Town of Norwood, Massachusetts v. FERC*, 202 F.3d 392, 402 (1st Cir. 2000).

[81] *Town of Norwood, Massachusetts v. National Grid USA*, 104 FERC ¶ 61,030 at P 19 (2004) (footnotes omitted).

[82] Norwood acknowledges that New England Power's CTC filing provided that updated estimates would not affect the CTC charges payable by a customer that terminated prior to the filing of the CTC formula.

the features included in the settling customers' CTCs. Norwood is not entitled to have it both ways, i.e., it cannot seek a better outcome through litigation in lieu of settlement, and then, in this proceeding, achieve the benefits of a settlement to which it was not a party.

53. In the Hearing Order, the Commission rejected several other arguments that Norwood raises again on exceptions to the ID. The Commission stated as follows:

> Both the Commission and the court of appeals have found that: (a) the imposition of a CTC when a customer terminates a contract before its expiration date is reasonable; (b) the rules related to stranded cost recovery do not apply to a charge for premature termination of a contract; and (c) the rules allowing customers to market or broker released capacity do not apply to premature contract termination.[83]

Thus, Norwood's arguments to the contrary are rejected.

54. The Commission also affirms the Judge's interpretation of language in the CTC filing accepted by the Commission stating that updated estimates will not affect CTC charges payable by a customer that terminates the contract early.[84]

55. Norwood challenges the use of the POLARIS forecast in determining the "M" factor. However, the Commission finds that the Judge's acceptance of that forecast was reasonable. The Judge determined that Norwood and Staff had not demonstrated that use of the POLARIS forecast rendered the

---

Although Norwood argues for a different interpretation of that sentence, the Commission finds that the provision is clear and may not be interpreted as urged by Norwood.

[83] *Town of Norwood, Massachusetts v. National Grid USA*, 104 FERC ¶ 61,030 at P 21 (2003) (footnotes omitted).

[84] Town of Norwood, Massachusetts v. National Grid USA, 107 FERC ¶ 63,041 at P 42 (2004).

CTC's market price estimate unjust and unreasonable. In fact, the Judge pointed to relevant contemporaneous prices that would have resulted in an even higher CTC for Norwood. Specifically, the Judge observed that the market prices in New England Power's POLARIS-based forecast were only slightly higher than the prices (1) in Norwood's replacement contract with Northeast Utilities, (2) in another power supply offer received by Norwood, and (3) that Norwood offered New England Power for continued purchase of power.

56. Finally, there is no merit to Norwood's allegation that New England Power could in effect collect twice on the power supply relinquished by Norwood. No double collection is possible because the CTC formula subtracts the value of the power supply relinquished by Norwood from the revenues otherwise collectable under the contract. The value of the power relinquished by Norwood is reflected as "M" in the CTC formula. Therefore, all that is collected from Norwood is the difference between what New England Power would have collected from Norwood, absent the contract termination, and what it would recover if it sold the relinquished power to another customer.

F. CTC Cap

1. The ID

57. The CTC cap is the maximum contract termination charge that Norwood can be obligated to pay.[85] New England

---

[85] The CTC cap was established by New England Power's March 18, 1998 tariff amendment filing. It provides as follows:

> In no event shall the difference between R and M . . . exceed the Customer's annual contribution to the Company's fixed power supply costs under this tariff. The Customer's annual contribution to the Company's fixed power supply costs shall equal its Total Revenue minus Transmission Revenue minus the Company's Average Fuel Costs. Average Fuel Costs shall equal the annual average of revenues the Company recovered for its Cost of Fuel, as defined in . . . this tariff multiplied by the Customer's monthly kilowatt-hour pur-

Power again argued that its proposed CTC cap is consistent with the stranded cost obligation provisions of Order No. 888-A,[86] which, according to New England Power, provides that the revenue stream estimate automatically includes an offset for the market value of any generating assets reflected in the utility's rates that are worth more than their book value.[87] New England Power also claimed that the Commission has approved use of the cost of fuel as a proxy for the variable power supply costs.[88] In addition, New England Power challenged the assertion that the CTC cap must be adjusted to afford Norwood treatment comparable to that of other customers.

58. In contrast, Norwood argued that New England Power's proposed cap overstated the fixed power supply costs. Nor-

---

chases during the period over which Total Revenue as determined in Section 1 above.

[86] New England Power cited *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Sfranded Costs by Public Utilities and Transmitting Utilities,* Order No. 888-A, 62 Fed. Reg. 12,274 (March 4, 1997), FERC Stats. & Regs. [Regulations Preambles, July 1996-December 2001] ¶ 31,048 at 30,425, 30,438 (1997).

[87] *Id.* at 30,438-39; Ex. NEP-52 at 7 – 8 ("If present rates include some assets that have a market value that exceeds net book value . . . the formula automatically captures the described offset because the revenue stream is based on the lower book value of the utility's assets rather than their higher market value.").

[88] New England Power cited New *England Power Co.,* 83 FERC ¶ 61,174 at 61,723 (1998). New England Power explains that in Order No. 888-A, the Commission recognized that the variable component of a wholesale power sale is "mostly fuel cost." New England Power cited *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities,* Order No. 888-A, 62 Fed. Reg. 12,274 (March 4, 1997), FERC Stats. & Regs. [Regulations Preambles, July 1996-December 2001] ¶ 31,048 at 30,433 (1997).

wood proposed alternate versions of a CTC cap, one of which subtracted the fixed cost of the divested plant assets from the applicable tariff rate.[89] Under this version, Norwood's maximum contribution to New England Power's remaining fixed costs would be a total of $18.3 million over the CTC payment period. The second version used the fixed costs that New England Power used to develop the CTCs paid by its affiliates,[90] resulting in a CTC cap of $7,459,963 for Norwood.

59. According to Staff, if the Order No. 888 stranded cost provisions are applicable here, then in the unique scenario in which a utility claims stranded assets and then divests those assets, the Commission will account for the divestiture in determining the appropriate recovery.[91] Staff also contended that New England Power overstated the CTC cap by including some variable costs as fixed costs, contrary to Order No. 888, which establishes a maximum stranded cost obligation as revenues minus "variable costs." Staff maintained that inclusion of only some variable costs in fixed costs allows for the subtraction from revenue of only a subset of variable costs, which then leads to a higher CTC cap. Staff proposed a revised CTC cap, which would include fixed power supply costs and allocate to Norwood its share of those costs for the balance of the contract term.[92]

60. The Judge explained that the CTC is capped as follows:

> [T]he difference between "R" and "M" cannot exceed the departing customer's annual contribution to NEP's fixed power supply costs under the Tariff, at the time of termination. That annual contribution is in turn defined in the Tariff as the difference between the departing

---

[89] Norwood cited Ex. NOR-32 at 3.

[90] Norwood cited Ex. NOR-35; Ex. NOR-30 at 17-20; Ex. NEP-35.

[91] Staff cited Ex. S-1 at 199-30.

[92] Staff cited Ex. S-1 at 200-21.

> customer's Total Revenue minus Transmission Revenue—which defines the R factor applicable to the customer—reduced by NEP's Average Fuel Costs with respect to the customer. NEP's Average Fuel Costs are the annual average of revenues NEP receives for its cost of fuel multiplied by the customer's monthly kilowatt-hour purchases during the period over which Total Revenue is determined. . . . [T]his determination is made on a one-time "snapshot" basis, at the time of termination.[93]

61. The Judge ruled that the issue of whether the CTC cap is just, reasonable, and not unduly discriminatory is properly within the scope of this case because the Commission set it for hearing.[94]

62. With regard to the parties' dispute over whether the CTC formula cap accounts for the sale of New England Power's assets in excess of their book value, the Judge agreed with Staff that the Order No. 888-A provision assumes the continuing availability of the fixed assets to supply electric service to a customer for which revenue is to be paid. That is not the case here.[95] The Judge also agreed with Staff that the cited provision does not pertain to establishing a stranded cost obligation "cap" when the utility has divested itself of fixed assets by selling them on the market. Further, the Judge stated that the provision does not concern the need to avoid double recovery of fixed assets that would occur once through the sale above book value, and then again through collecting revenues from Norwood as though the fixed assets were still on the books. Thus, concluded the Judge, stranded cost obli-

---

[93] The Judge cited Ex.NEP-1 at 13–14.

[94] The Judge cited Town of Norwood, Massachusetts v. National Grid USA, 104 FERC 61,030 at P 18 (2003).

[95] The Judge cited Ex. NEP-52 at 30,439 ("The revenue stream is based on present rates, which are based on the net book value of all of the underlying assets *used to provide the service.*")(emphasis added).

gation principles are not controlling in determining the justness and reasonableness of the Norwood CTC or the CTC cap formula.[96]

63. Because the Judge found that the CTC cap improperly included fixed non-nuclear assets that had been divested and also improperly included certain variable costs as fixed costs, the Judge rejected New England Power's proposed CTC cap. The Judge also rejected Norwood's proposals.[97] Instead, the Judge adopted the CTC cap recommended by Staff, which as revised, is $25,403,742.[98] Accordingly, the Judge concluded that, as modified by the ID, the CTC of $16,925,796, is well below the $25,403,742 cap.

2. Positions of the Parties on Exceptions

64. Norwood maintains that this case involves the divestiture of assets, as contemplated by Order No. 888, and thus,

---

[96] The Judge cited *Town of Norwood, Massachusetts v. National Grid USA*, 104 FERC ¶ 61,030 at P 21 (2003), *citing New England Power Co.*, 83 FERC ¶ 61,174 at 61,273, *reh'g denied*, 84 FERC ¶ 61,175 (1998); *Town of Norwood, Massachusetts v. FERC*, 202 F.3d 392, 398-99 (1st Cir. 2000).

[97] Norwood cited Ex. NOR-35; Ex. NOR-30 at 17-20.

[98] The Judge cited Ex. S-12. She acknowledged that New England Power has pointed out the inconsistencies in Staff's first calculation of the CTC cap. However, the Judge pointed out that New England Power has custody and control of the records necessary to clarify which costs fall into which category. Therefore, New England Power has the burden of producing evidence to clear up inconsistencies in Staff's initial calculations. According to the Judge, New England Power has had the opportunity during this case to clear up any inconsistencies that may have resulted from a hastily filed CTC and should therefore be held responsible for the consequences of the CTC cap provision. Further, stated the Judge, New England Power should not be allowed to dispute the credibility of the revised calculations, which are based upon new information it provided. The Judge emphasized that this holding does not disturb the Commission's directive that the party challenging the CTC holds the burden of proof; rather, it ensures that the CTC that New England Power charges Norwood is just, reasonable, and not unduly discriminatory.

the amount of stranded costs associated with those assets is the book value less the sale price.[99] Norwood also contends that its CTC cap calculation eliminates bonuses improperly conferred by Respondents on their affiliates and reflects divestiture of the nuclear facilities, as did the settling parties' CTCs. Norwood calculates its share of the fixed costs to be $7,459,963.[100] It further argues that the Judge erred in adopting Staff's revised CTC cap without correcting for acknowledged overstatements in the computation, which Norwood claims would reduce the cap to $21,624,966.

65. Norwood asserts that the Judge correctly found that the proposed CTC cap treats certain variable costs as fixed costs. Because fuel costs normally are variable costs, Norwood argues that New England Power bore the burden of proving that some of the variable costs are not included in the fixed costs. Norwood also argues that there are many other variable costs that are not fixed costs, so the Judge properly ruled that it would not be just and reasonable to include those in the fixed costs.

66. Respondents maintain that calculation of the CTC cap is flawed because the Judge uses the same total revenue factor that Respondents have challenged, as discussed above. Moreover, Respondents argue that the CTC cap reflects certain additional errors. First, they claim that the reduction in actual revenues used to calculate the cap is not necessary to protect Norwood from undue discrimination since Norwood declined to terminate service early under the methodology used in the settling customers' CTCs.

---

[99] Norwood cites *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Sts. & Regs. [Regulations Preambles, January 1991-June 1996] 31,036 at ¶ 31,842 (1996).

[100] Norwood cites Ex. NOR-35 at 1-3.